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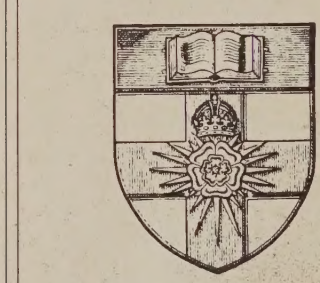

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OF THE

# HIGH COURT OF JUSTICE

AND BY THE

# COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

# COURT OF CRIMINAL APPEAL

AND BY THE

# RAILWAY AND CANAL COMMISSION.

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## THE KING *v.* THE LICENSING JUSTICES FOR THE COUNTY BOROUGH OF SOUTH SHIELDS.

1911
*March* 21.

*Licensing Acts—Offence—"Second Offence"—Forfeiture of Licence—Selling Liquor at Place not covered by Licence—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

By s. 3 of the Licensing Act, 1872, any person selling or exposing for sale any intoxicating liquor at a place where he is not licensed to sell the same shall be liable, "for the first offence," to a penalty not exceeding 50*l.* or to imprisonment for a term not exceeding one month; "for the second offence," to a penalty not exceeding 100*l.* or to imprisonment for a term not exceeding three months; and "for the third and any subsequent offence" to a penalty not exceeding 100*l.* or to imprisonment for a term not exceeding six months. "In addition to any other penalty imposed by this section any person convicted of a second or any subsequent offence under this section shall, if he be the holder of a licence, forfeit such licence":—

*Held*, that the expression "second or any subsequent offence" in

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s. 3 means a second or subsequent offence committed after a previous conviction or previous convictions, as the case may be, for an offence under the section, and that therefore the licence is not forfeited upon a second conviction for an offence which is committed before the conviction for the first offence.

RULE calling upon the licensing justices in and for the county borough of South Shields to shew cause why a writ of mandamus should not issue commanding them or some of them to hold within a reasonable time an adjournment of the general annual licensing meeting for the said county borough holden on or about February 8, 1911, and at such adjournment to proceed to hear and determine according to law the matter of an application by Arthur James Morrison for the renewal to him of a licence to sell beer by retail to be consumed off the premises known as the Victoria Bottling Works in the said county borough, on the ground that the said licence had not by reason of the convictions of the said Arthur James Morrison on November 16, 1910, become forfeited, and that, no objection to the renewal of the said licence having been given to or received by the licensee, the said Arthur James Morrison, and his application for the consideration of the said renewal not having been adjourned, he was entitled to a renewal of his said licence.

The following facts appeared from the affidavits. The applicant, Arthur James Morrison, on August 18, 1909, became the licensee of the premises known as the Victoria Bottling Works, in the county borough of South Shields, for the sale of beer by retail to be consumed off the premises. The licence was at the general annual licensing meeting for the borough in February, 1910, renewed to him, and the licence would in the ordinary course expire on April 5, 1911.

On November 9, 1910, two informations were preferred against the applicant and two summonses were issued thereon, one charging him with having on November 4, at the parishes of Weelslade and Pontiland, in the county of Northumberland, then being the keeper of the licensed premises above mentioned, unlawfully sold by retail certain intoxicating liquors, to wit, beer and stout, at certain places where he was not authorized by his licence to sell the same, contrary to s. 3 of the Licensing Act,

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1872 (1) (now s. 65 of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), and the other charging him with having on the same day and at the same places unlawfully exposed for sale the said intoxicating liquors contrary to s. 3 of the said Act. The summonses came on for hearing on November 16, 1910, before the justices for the Castle Ward division of the county of Northumberland, when the two informations were, with the consent of the applicant's counsel, heard together. The affidavit filed on behalf of the applicant stated that the offences charged related to the same occurrences, and that the exposing for sale was to the same person and persons as the sale (2), though the affidavit filed in opposition to the rule

(1) 35 & 36 Vict. c. 94, s. 3: "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorized by his licence to sell the same. Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorized by his licence to sell the same, shall be subject to the following penalties; that is to say,

"(1.) For the first offence he shall be liable to a penalty not exceeding fifty pounds, or to imprisonment with or without hard labour for a term not exceeding one month:

"(2.) For the second offence he shall be liable to a penalty not exceeding one hundred pounds, or to imprisonment with or without hard labour for a term not exceeding three months, and he may, by order of the Court by which he is tried, be disqualified for any term not exceeding five years from holding any licence for the sale of intoxicating liquors:

"(3.) For the third and any subsequent offence he shall be liable to a penalty not exceeding one hundred pounds, or to imprisonment with or without hard labour for any term not exceeding six months, and may by order of the Court by which he is tried be disqualified for any term of years or for ever from holding any licence for the sale of intoxicating liquors:

"In addition to any other penalty imposed by this section any person convicted of a second or any subsequent offence under this section shall, if he be the holder of a licence, forfeit such licence . . . ."

By s. 74, "'intoxicating liquor' means . . . . beer . . . ."

(2) It was stated by counsel that the two charges arose out of the offering for sale and the sale of bottles of beer and stout from a cart which contained more bottles than had been ordered by customers.

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stated that the information charging the sale of the liquor was required to be proved by evidence which was not necessary upon the information for exposing the liquor for sale. The justices convicted the applicant upon each information and fined him 5*l.* and costs in respect of each of the offences charged. No adjudication or statement was made by the justices that the licence was by the convictions forfeited. The applicant did not appeal against either of the convictions. Notices of the two convictions were duly sent to the clerk to the licensing justices of the borough of South Shields in accordance with s. 9, sub-s. 1, of the Licensing Act, 1902 (now s. 50, sub-s. 2, of the Licensing (Consolidation) Act, 1910), and were recorded in the register of licences. Notice of the convictions was also sent to the owner of the licensed premises. The applicant after the convictions continued to carry on business on the premises. In consequence of an intimation from the chief constable for the borough that he would bring to the notice of the licensing justices at the general annual licensing meeting on February 8, 1911, the fact that the applicant had been convicted on November 16, 1910, of two offences, the applicant appeared by counsel at the said meeting and applied for a renewal of his licence. No notice of objection or opposition to the renewal of the licence had been given to the applicant. The report of the chief constable was brought before the licensing justices, and they held that the licence had, by virtue of the provisions of s. 3 of the Licensing Act, 1872, become forfeited upon the second conviction, that therefore there was no existing licence to renew, and that the proper application would have been for a new licence. They accordingly refused the renewal.

The applicant thereupon obtained the above rule.

*Inskip*, for the licensing justices, shewed cause. The licensing justices had notice of two convictions of the applicant for two offences under s. 3 of the Licensing Act, 1872, and therefore the applicant must have committed a "second offence" within the meaning of that section. Upon that second conviction the licence became forfeited, and therefore at the date of the application for a renewal of the licence there was no licence in

existence to renew, and the proper application would have been for the grant of a new licence. The licensing justices were right in refusing to grant a renewal of the licence. The section does not say that the second conviction must state on its face that it is a conviction for a second offence, nor does it say that it must be a conviction for an offence committed after a previous conviction. The words are quite clear and perfectly general, and it is only necessary that there shall be a "second offence" in order to work a forfeiture of the licence. There were in fact two offences in this case, in respect of which two informations were preferred against the applicant and two summonses issued, though by consent the two informations were heard together, and there were two convictions. The licensing justices had no power to go behind the convictions and to inquire into the facts which gave rise to them. If the applicant considered that he ought not to have been convicted on both informations, he ought to have appealed to quarter sessions, and as he did not do so the convictions stand, and the licensing justices were bound to take cognizance of them. There being two convictions, one must have been a conviction for "a second offence," and the licensing justices were right.

*Scott Fox, K.C.*, and *C. E. Jones*, in support of the rule. A "second offence" in s. 3 of the Licensing Act, 1872, means an offence committed after a previous conviction for an offence under the section. If this were not so, there would have been no object in the provision in s. 56 which required, in the case of a conviction for an offence against the Act the repetition of which might render the premises liable to be disqualified from receiving a licence, that notice of the conviction should be served on the owner of the premises. The only reason for requiring the notice to be served on the owner is to give him an opportunity of obtaining a better tenant. If two convictions on the same day operate as a forfeiture of the licence under s. 3, the requirement as to giving the notice will be futile. If, however, the true reading of the words "second offence" is that it must be an offence committed after a previous conviction, then there is a reason for requiring notice of the first conviction to be served on the owner. The augmented penalties prescribed in

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the earlier part of s. 3 for second and subsequent offences indicate that the section aims at a persistent breach of the Act after a conviction. The expressions "second offence" and "subsequent offence" must have the same meaning in both parts of s. 3. In 2 Co. Inst., p. 468, note 5, dealing with the Statute of Westminster the Second, c. 44, it is said that "though this branch saith, et super hoc convicti fuerint, and may seem to refer to the third offence, yet cannot he be convicted of the third before he be convicted of the second, nor of the second before he be convicted of the first; and the second offence must be committed after the first conviction, and the third after the second conviction, and severall judgements thereupon given; for so it is to be understood in other Acts of Parliament, where there be degrees of punishment inflicted, for the first, second, and third offence, &c., there must be severall convictions, that is to say, judgements given upon legall proceeding for every severall offence, for it appeareth to be no offence untill judgement by proceeding of law be given against him"; and in Maxwell on the Interpretation of Statutes, 4th ed., p. 525, the above passage is cited as an authority for the proposition that "when a 'second offence' is the subject of distinct punishment, it is an offence committed after conviction of a first." The punishment for the second or subsequent offence being greater than for the first offence, the words "second offence" and "third and any subsequent offence" in s. 3 mean an offence committed after a previous conviction or previous convictions. The licence therefore was not forfeited under s. 3 of the Act, and the licensing justices were wrong in refusing to hear and determine the application for a renewal of the licence.

LORD ALVERSTONE C.J. This rule must be made absolute. There is a preliminary matter which I desire to mention in order that our decision may not be misunderstood. The question is not now before us whether upon the true construction of s. 3 of the Licensing Act, 1872, a person can be convicted both of selling and also of exposing for sale intoxicating liquor contrary to that section where the facts relied on as constituting the two offences

are the same. I express no opinion upon that. At the same time I think it right that I should guard myself against being understood to hold that, if the facts relating to the two offences of exposing for sale and selling are the same, a person can, after conviction for exposing for sale, be convicted of selling. The observations of Blackburn J. and the other judges in *Wemyss* v. *Hopkins* (1) have some bearing upon this (2), and I express no opinion as to whether the applicant should have been convicted of the two offences.

The question which we have to decide is whether upon the application for the renewal of this licence the licensing justices were right in treating the licence as forfeited, and in holding that there could be no application for a renewal of it, but only an application for a new licence. The licensing justices had before them two convictions which shewed that the applicant had been convicted of two offences under s. 3 of the Licensing Act, 1872. There was nothing upon the face of either conviction to shew that it was a conviction for a second or subsequent offence, but it did appear upon the face of the convictions that they had both been obtained at the same time. No doubt the fact that there were two convictions is almost conclusive to shew that one of those convictions must have been a second conviction, but that is not what the section says. Sect. 3, which has now been repealed and re-enacted in somewhat similar language in s. 65 of the Licensing (Consolidation) Act, 1910, contains a provision that "any person convicted of a second or any subsequent offence under this section shall, if he be the holder of a licence, forfeit such licence." We have to consider what is the true meaning of those words. The first part of the section prohibits the sale or exposing for sale of any intoxicating liquor without a licence or at a place not covered by the licence, and it imposes penalties upon the person who commits an offence under the section—"for the first offence he shall be liable to a penalty not exceeding fifty pounds, or to imprisonment with or without hard labour for a term not exceeding one month"; "for the second offence" to an increased penalty or increased term of imprisonment; and "for the

(1) (1875) L. R. 10 Q. B. 378.

(2) See also *Dorrian* v. *M'Hugh*, [1907] 2 I. R. 564.

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third and any subsequent offence" to a similar penalty to that for the second offence, or an increased term of imprisonment. It seems to me that it is quite impossible to give a reasonable construction to the various clauses of the section unless the words "second offence" and "third and any subsequent offence" are read as meaning an offence after a previous conviction or convictions, as the case may be, for an offence under the section. The enactment aims at a persistent breach of the law after a previous conviction, and though the section does not in terms say that the offence to be punished with the heavier penalty must be one committed after a previous conviction for a similar offence, it is not reasonable to say that where a person commits three offences under the section on the same day a different penalty attaches to each of those offences. Apart therefore from the assistance which is to be derived from the weighty authority of 2 Co. Inst., p. 468, note 5, I have come to the conclusion that in this particular part of the section a "second offence" means an offence committed after a previous conviction for an offence under the section.

That being the construction which ought to be placed upon the first part of the section, there follow the words which give rise to the discussion before us. "In addition to any other penalty imposed by this section any person convicted of a second or any subsequent offence under this section shall, if he be the holder of a licence, forfeit such licence." That is to say, by an automatic operation of the law a conviction for a second offence deprives the licence-holder of his licence and therefore of his means of living. In those circumstances, when we apply the forfeiture clause we ought to give to the words the same meaning as they bear in the earlier part of the section. In my opinion therefore the words "second or any subsequent offence under this section" mean an offence committed after a previous conviction or previous convictions, as the case may be, for an offence under the section. It is said on behalf of the licensing justices that they had evidence of two convictions before them, and that as one must necessarily be first and the other second there was before them a conviction for a "second offence" within the meaning of the section which created a forfeiture of the licence, and that they

were not bound or indeed entitled to inquire further. The fallacy of that argument lies in a misconstruction of the section. All that the licensing justices had before them was the fact that there were two convictions against the applicant for two offences against the section committed on the same day. That is not enough to shew a "second" offence within the section so as to bring the forfeiture clause into operation. The rule therefore must be made absolute.

RIDLEY and CHANNELL JJ. agreed.

*Rule absolute.*

Solicitors for applicant: *Doyle, Devonshire & Co., for Molineux & Sinton, Newcastle-upon-Tyne.*

Solicitors for respondents: *Ford & Ford, for R. Purvis, South Shields.*

W. F. B.

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## GREVILLE-SMITH *v.* TOMLIN.

1911

*March 22.*

*Local Government — Urban District Councillor — Disqualification — Joint Hospital Committee for Two Districts — Clerk of Committee — Paid Office under Council — Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 46.

By an agreement between the corporation of a borough and the council of an urban district a joint committee was formed for the purpose of providing hospitals for the use of the inhabitants of the borough and district jointly, half the committee being appointed by the corporation and half by the district council. The appellant was appointed by the committee as their salaried clerk, and was paid his salary by them out of funds which were in part derived from contributions by the corporation and the district council respectively:—

*Held*, that the appellant was the holder of "a paid office under the district council" within the meaning of s. 46 of the Local Government Act, 1894, and consequently was disqualified from being a member of that council, none the less because the corporation joined in his appointment and in the payment of his salary.

CASE stated by justices of Middlesex.

The appellant was summoned on an information charging that he unlawfully acted as chairman of the Heston and Isleworth Urban District Council while holding a paid office under

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the said district council contrary to s. 46 of the Local Government Act, 1894.

At the hearing the following facts were proved or admitted. The appellant was elected a councillor of the Heston and Isleworth Urban District Council in the year 1907, and he was re-elected in 1910. He was elected chairman of the council in the years 1908, 1909, and 1910, and he acted as chairman at the meeting of the council held on July 19, 1910.

By an agreement dated June 11, 1895, made between the corporation of the borough of Richmond and the Heston and Isleworth Urban District Council, the Borough of Richmond and Heston and Isleworth Urban District Joint Isolation Hospital Committee was formed for the purpose of providing and maintaining hospitals for infectious diseases for the use of the inhabitants of the said borough and urban district. By the agreement it was provided that the said joint hospital committee should consist of twelve persons, six being appointed by the council of the borough and six by the district council out of their own members respectively, and the borough council and the district council delegated all their powers in reference to the maintenance and management of and otherwise dealing with the hospitals to, and to be carried out by, the said joint hospital committee. It was also provided by the agreement that it should not be determined except by the mutual consent of both parties. The joint hospital committee employ a staff of officers for the management of their hospitals and for the purpose of carrying on the work in connection therewith. All such officers are appointed solely by and their salaries are paid by the joint hospital committee by cheques drawn by the said committee on the London and Provincial Bank. The manager of the Richmond branch of that bank is the treasurer of and is appointed by the said committee. Such treasurer and bank are not the treasurer or bank of the district council, and there is no privity between the district council and the treasurer and bank of the said committee, the treasurer being responsible to the committee and owing no duty to the district council as to the disposal of the funds of the committee entrusted to him. The appellant was in the year 1898 appointed by the said committee as their salaried

clerk, and in the year 1910 the salary attached to that office was 150*l.* per annum. The appellant on July 19, 1910, still held the said office of clerk. The district council were not consulted by the hospital committee in reference to the appointment of the appellant as such clerk, or as to the salary which should be paid to him. There was no minute in the books of the district council making, confirming, or approving of such appointment, and no cheque was ever drawn by the district council in favour of the appellant for the payment of his salary as clerk to the hospital committee. The district council have never appointed, removed, or dismissed any officer or person in the employ of the said hospital committee, but all officers and persons employed by the committee are appointed and dismissed by the committee. The funds of the committee are derived from (1.) payments made for treatment by patients in the hospitals; (2.) rents of surplus lands; (3.) moneys paid by the borough council and the district council on precepts sent annually by the hospital committee to the borough and district councils respectively. The accounts of the committee are audited by an auditor appointed by the Local Government Board. That auditor is not the auditor appointed by the said Board to audit the accounts of the district council. It was proved that the appellant before acting as a councillor took the opinion of counsel as to whether he was disqualified and was advised he was not.

It was contended for the appellant that he was not a paid officer under the district council, with whom he had no contract of employment, and by whom he was neither appointed nor paid, and who could not dismiss him; that the joint hospital committee was not a committee of the district council, but an independent authority paying and dismissing its own officers, and that the Local Government Board recognized it as such.

The justices were of opinion that, having regard to the provision in the agreement (under which the joint hospital committee was formed) that the agreement should not be determined except by the mutual consent of both parties, it was possible for the appellant as chairman of the council to be in a position to prevent the abolition of the joint hospital committee of which he was clerk, and they held that he was in the pay directly or

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indirectly of the district council. They accordingly convicted the appellant.

*C. A. Russell, K.C.*, and *Morton Smith*, for the appellant. The office of clerk to the joint hospital committee was not a paid office under the district council. The justices thought that the case was governed by the decision in *Crump* v. *Lewis* (1), where it was held that a person who holds a paid office under a distress committee established for an urban district under the Unemployed Workmen Act, 1905, holds a paid office under the district council within the meaning of s. 46 of the Act of 1894. But there the distress committee was not an independent body, but was a committee of the district council, consisting of members of that council alone. Here the combination of members of two different councils involves the creation of a third body quite distinct from either of the parent bodies. Holding an office under a body imports that that body has the power of dismissing the holder, which the district council had not. If the appellant's salary was not paid he could not sue the district council for it; his cause of action would be against the joint committee. The fact that the salary is contributed to by the district council does not make it a payment by them. In *Reg.* v. *Rawlins* (2) it was held that a statute which provided that a person receiving a salary from the poor rates should be disqualified from serving as a guardian did not apply to a clerk whose salary was paid out of a fund fed partly by contributions from the poor rates and partly from other sources.

*Lawrie*, for the respondent. To constitute a paid office under the council the office need not be held directly under the council nor be paid directly by them. The agreement for the constitution of the joint hospital committee was made under the powers given by s. 285 of the Public Health Act, 1875; and that section expressly provides that "All moneys which any local authority may agree to contribute for defraying expenses incurred under this section shall be deemed to be expenses incurred by them in the execution of works within their district." Therefore the portion of the salary contributed by the district council was

(1) [1908] 1 K. B. 858. (2) (1885) 15 Q. B. D. 382.

to be deemed to have been paid by them as if the appellant were their own servant. Moreover, the position of the appellant was within the mischief aimed at by s. 46, for his interest as clerk to the committee might conflict with his duty as chairman of the council. If there were a proposal by the Richmond Corporation to sever the joint committee the appellant might be induced by the fear of losing his salary to use his influence on the district council in opposition to the proposal, although it might be for the benefit of the locality that the joint committee and with it his office should cease.

*Russell, K.C.*, in reply.

LORD ALVERSTONE C.J. Speaking for myself I may say that it is with great regret that I feel myself compelled to hold that the appeal fails, for it is obvious that the appellant had no intention of breaking the law. But at the same time I cannot say that I entertain any doubt about the matter. Sect. 46, sub-s. 1, says that "A person shall be disqualified for being a member or chairman of a council . . . . of a district . . . . if he (*d*) holds any paid office under the . . . . district council." That section is in perfectly general terms and I do not feel myself at liberty to put a limited construction upon it. We must look at the mischief which was contemplated by the Legislature when enacting it. The appellant holds the office of clerk to the joint hospital committee for the borough of Richmond and the Heston and Isleworth urban district, a body which came into existence under an agreement made under the powers conferred by ss. 131 and 285 of the Public Health Act, 1875. The scheme of that agreement was that the borough council and the district council should each appoint six of their members to act upon the joint committee, and that those twelve gentlemen should become the authority charged with the duty of providing and maintaining the joint hospitals. The funds for the purpose were provided partly out of contributions levied upon the rateable property in the borough and the urban district respectively, and partly from receipts from other sources. Those latter receipts were small in amount, but it would not have made any difference if they had been large. The question is what was

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the real position of those twelve gentlemen. They acted as the agents of the two councils in carrying out the work which those councils had jointly undertaken. They were not a corporation, and there was nothing in the Public Health Act to give them a separate independent existence. They were merely the delegates of the two authorities respectively who appointed them. Then there is a provision in the agreement that it shall not be determined except by the mutual consent of both parties. Under those circumstances it would not in my opinion be right to hold that the appellant could concurrently be chairman of the district council and salaried clerk to the joint committee, for he might have a personal interest in using his influence to prolong the existence of the committee though its continuance might be opposed to the interests of his district. It was said by Mr. Russell that the joint committee is a composite body distinct from the two councils to which it owes its origin, and that that prevents its officer from holding office under the district council. But in my judgment the clerk to the joint committee none the less holds office under the district council because another body joined in his appointment and in the payment of his salary.

RIDLEY J. I agree. I think that we ought to construe the section with due regard to the mischief aimed at, and the facts of this case are sufficient to bring it within that mischief.

CHANNELL J. I am of the same opinion.

Solicitor for appellant: *H. R. Peake.*
Solicitor for respondent: *Freke Palmer.*

J. F. C.

## LANSTON MONOTYPE CORPORATION, LIMITED *v.* ANDERSON (Surveyor of Taxes).

1911
*Feb.* 15.

*Revenue—Income Tax—Average Profits and Gains—Deduction — Patent—Royalty—Royalty ceasing to be payable—Finance Act*, 1907 (7 *Edw.* 7, *c.* 13), *s.* 25, *sub-s.* 1.

By s. 25, sub-s. 1, of the Finance Act, 1907, it is provided that "in estimating, under any schedule of the Income Tax Acts, the amount of the profits and gains arising from any trade, manufacture, adventure, concern, profession, or vocation, no deduction shall be made on account of any royalty, or other sum, paid in respect of the user of a patent." The sub-section continues thus: "but the person paying the royalty or sum shall be authorized, on making the payment, to deduct and retain thereout the amount of the rate of income tax chargeable during the period through which the royalty or sum was accruing due":—

*Held*, that the first part of the sub-section applies even where by arrangement between the person owning and the person using the patent all royalties and other sums in respect of the user thereof have ceased to be payable before the year of assessment.

Case stated under s. 59 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), by the Commissioners for the General Purposes of the Income Tax Acts for the city of London.

By r. 1, case 1, in Sched. D to s. 100 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), the duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule to the Act, are to be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the 5th day of April preceding the year of assessment, and shall be assessed, charged, and paid without any other deduction than is thereinafter allowed.

Rules 3 and 4 of the same schedule and case prohibit the deduction of various expenses and losses which do not include royalties or other sums paid in respect of the user of a patent.

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By s. 25, sub-s. 1, of the Finance Act, 1907 (7 Edw. 7, c. 13), it is enacted that in estimating, under any schedule of the Income Tax Acts, the amount of the profits and gains arising from any trade, manufacture, adventure, concern, profession, or vocation, no deduction shall be made on account of any royalty, or other sum, paid in respect of the user of a patent, but the person paying the royalty or sum shall be authorized, on making the payment, to deduct and retain thereout the amount of the rate of income tax chargeable during the period through which the royalty or sum was accruing due.

By sub-s. 2 it is provided that sub-s. 3 of s. 24 of the Customs and Inland Revenue Act, 1888, shall apply to any such royalties or sums as it applies to interest of money or annuities charged with income tax under Sched. D in the Income Tax Act, 1853 (16 & 17 Vict. c. 34). (1)

The Lanston Monotype Corporation, Limited, appealed against an assessment of 18,031*l.* (less 2250*l.* allowed for depreciation by reason of diminution in value of machinery and plant) for the financial year ending April 5, 1908, under the provisions of Sched. D to the Income Tax Act, 1853, and under the Finance Act, 1907.

The appellants were incorporated as a company to acquire the

(1) By s. 2 of the Income Tax Act, 1853, duties are to be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains comprised in the several schedules contained in the Act.

Sched. D to the Act includes annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, and also includes all interest of money, annuities, and other annual profits and gains therein mentioned.

By the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 24, sub-s. 3, Upon payment of any interest of money or annuities charged with income tax under Schedule D (i.e., of the Income Tax Act, 1853), and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be; and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly; . . . .

sole right to manufacture and dispose of the Lanston monotype type casting and setting machine in the United Kingdom.

The question arising in the case was whether the royalties which had been paid by the appellants for the user of certain foreign patents before the coming into operation of the Finance Act, 1907, and which in consequence of arrangements between the appellants and the owners of the patents ceased to be payable from and after January 1, 1907, were, having regard to the provisions of that Act, to be deducted in arriving at the profits of each of the three years entering into the average for the purpose of estimate for assessment for the year 1907–8.

The average profits for the three preceding years, as ascertained on the basis that the royalties ought to be deducted, amounted to 12,529*l*. As ascertained on the basis that the royalties ought not to be deducted, the average profits amounted to 18,031*l*.

Up to the year 1907 the appellants were assessed on the average of three years ending on September 30 preceding the year of assessment in each case and were allowed in arriving at each year's assessment by way of deduction the amount of royalties which they had paid in respect of the patents during the aforesaid three years of average.

The appellants contended that the assessment should be made on the sum of 12,529*l*. only (that is, on the average profits during the three preceding years as ascertained on the basis of the royalties being allowed as a deduction); that the operation of s. 25 of the Finance Act, 1907, is prospective only and not retrospective; that, no royalties being payable during the year of assessment, it was not possible for the appellants to deduct or retain thereout the amounts of the income tax chargeable during the period through which the respective royalties were accruing due; and that the profits for the years ending September 30, 1904, and September 30, 1905, having already been ascertained for the purposes of income tax on one basis, could not be ascertained on a different basis for the year 1907-8.

The surveyor of taxes, on the other hand, contended that the assessment should be on the sum of 18,031*l*. (that is, on the average profits during the three preceding years as ascertained on the basis that the royalties were not allowed as a deduction);

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that the average of the three preceding years is the method prescribed by the provisions of the Income Tax Acts merely for the purpose of estimating the profits in any one year; and that under the Finance Act, 1907, in arriving at that estimate no deduction must be made on account of the royalties.

The Commissioners were of opinion that the contention of the Crown was correct and confirmed the assessment, but stated this case for the opinion of the High Court.

*Danckwerts, K.C.*, and *Austen-Cartmell*, for the appellants. The history of this legislation shews that the decision of the Commissioners is wrong. Before the Finance Act, 1907, when the appellants were computing their statutory income on an average of the profits and gains for the three years before the year of assessment, they would have deducted from the amount so arrived at the amount of royalties paid during the three years. They would have been, and up to the present have been, taxed on the balance, and the person entitled to the royalties would have, and no doubt has, included them in his return to the proper officer, and has been taxed on those royalties. The Finance Act, 1907, merely applied to this state of things the principle of taxing at the source; it made the person paying the royalties the collector of the income tax due on the royalties. Instead of deducting the royalties in arriving at his statutory income and allowing the person to whom they are payable to make a return of them, the person paying the royalties now includes them in his income and deducts the tax due upon them before paying them to the person to whom they are payable. The Act merely supplies an improved machinery for collecting the tax payable on the royalties. With this object in view it provides that in estimating the amount of profits and gains arising from any trade, manufacture, &c., no deduction shall be made on account of any royalty paid in respect of the user of a patent, but the person paying the royalty shall be authorized, on making the payment, to deduct and retain thereout the amount of the rate of income tax chargeable during the period through which the royalty was accruing due. This is all one enactment, no part of which has any greater force than any

other part. The two limbs of the sentence connected by the word "but" may be transposed without altering the meaning of the enactment. It would then read thus: "The person paying the royalty shall be authorized, on making the payment, to deduct and retain thereout the amount of the rate of income tax, and no deduction shall be made on account of any royalty paid in respect of the user of a patent." The enactment thus read clearly applies only where there is some person paying the royalties. In other words, the first limb of the sentence prohibiting the deduction of royalties only applies where the second limb is effective, and a person paying no royalties in the year of assessment is not precluded from deducting royalties which he has paid in the three years before the year of assessment; otherwise he is being taxed, not upon his profits, but on his profits and on the royalties also, i.e., on the profits of another. Furthermore, the owner of the royalties is also taxed on them, and so the Crown exacts the tax twice. A new burden is imposed on the person paying the royalties. This is an intention which, in the view of Lord Davey, is not to be attributed to the Legislature in an Act merely providing machinery for facilitating the collection of the tax: *London County Council* v. *Attorney-General.* (1)

*Sir Rufus Isaacs*, *A.-G.*, and *W. Finlay*, for the Crown. The argument for the appellants gives many reasons which might have been and perhaps were urged against the enactment of s. 25, sub-s. 1, of the Finance Act, 1907, but none for giving to that enactment, now that it has been passed, any interpretation other than the natural meaning of its words. The appellants like other subjects are taxed upon an average income. The average income often differs from the actual income; if it did not there would be no object in taking an average income as the basis of the income tax. The system of taxing at the source applied by the enactment in question may cause apparent hardship in particular cases, but it has been deliberately employed because of the greater facility it affords in assessing and collecting the tax. The enactment says that no deduction shall be made on account of any royalty paid in respect of the user of a patent.

(1) [1901] A. C. 26, at p. 43.

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That makes an end of the appellants' case, unless they can read into the subsequent words an exception and can then bring themselves within that exception. The subsequent words contain no exception. They merely say what may be done as the result of the earlier part of the enactment, namely, that the person paying the royalty shall be authorized to deduct thereout the tax chargeable thereon. If for his own purposes he has put it out of his power to deduct the tax from future royalties, he does not thereby exempt himself from the operation of the earlier part of the enactment.

*Danckwerts, K.C.*, in reply.

HAMILTON J. This case raises a question as to the mode of arriving at the statutory income upon which the appellants are chargeable under Sched. D of the Income Tax Act, 1853, for the financial year ending April 5, 1908, before the end of which year the Finance Act, 1907, had come into operation. The financial year of the appellants terminates on September 30 in each year, and accordingly the three years upon which they were entitled to have the average of their profits ascertained before the year of assessment in question were the years ending September 30, 1904, 1905, and 1906. A large part of their business consists in manufacturing and disposing of a patented article, and in those three years they were exercising the right to manufacture under the patent and were paying large sums by way of royalty for so doing. The payment of those sums ceased on January 1, 1907, in consequence of arrangements between the appellants and the owners of the patent, and therefore in the financial year in question they had no royalties to pay to anybody. The contention of the Crown is that the sums paid in those three previous years must not be deducted for the purpose of getting by way of average the sum to be charged. Before the Act of 1907 came into force those sums would have been expenses wholly or exclusively laid out or expended for the purpose of such trade and could have been deducted, but it is said that since the Act of 1907 they cannot be so deducted, the result of which is that the statutory income chargeable in the year of charge is considerably greater when the average is

thus taken than it would be if the average were taken over the three years after deducting those royalties year by year as moneys expended for the purposes of the trade. What has worked this change is s. 25 of the Finance Act, 1907. That section contains two sub-sections, and the first sub-section is in two parts. [The learned judge read the section, and continued.] I think sub-s. 2 makes it obligatory on the trader to make deductions, if he is entitled to do so, from the recipient of the royalty and account for and pay the same to the revenue, or not, according as it may be his duty to do so having regard to the provision of s. 24 of the Customs and Inland Revenue Act, 1888.

The appellant company contends that first of all the object of s. 25, sub-s. 1, of the Finance Act, 1907, is to provide for payment of tax on patent royalties by deduction, and I think the object of it may be fairly so expressed. It is then contended that upon the principle clearly stated by Lord Davey in *London County Council* v. *Attorney-General* (1), if the object of a section is the improvement of the machinery of collection, and if it is not a charging section, it ought not to be treated as imposing a fresh burden upon the subject, but merely as facilitating the encashment of the existing burdens. That rule is of course only a rule of construction which must give way in the face of any plain expression of the intention of the Legislature to the contrary. The appellants say that so far from the expressed intention of the Legislature being plainly in favour of the Crown it is plainly the other way, or at least it is so ambiguous as to make it the duty of the Court, within the dicta in various cases, to lean in favour of the subject, and not to construe the section so as to impose burdens where it is not clear that the Legislature intends to impose those burdens. It is pointed out that the plain words of the first limb of sub-s. 1 are in effect modified by the attachment to it of other words, which, instead of leaving it a charging section, in substance make the first part applicable only where the benefit given to the subject by the second part is applicable also. It is said that the word "but" shews that the object of the section is to improve the machinery, and to

(1) [1901] A. C. 26, at p. 43.

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substitute for deduction of royalties from the amount of the profits and gains the retention of the tax from the person entitled to the royalty when it is paid over to him; and hence that it is only in cases where the words, "the person paying the royalty or sum shall be authorized on making payment to deduct and retain," have a real application, that the first mandatory words, "no deduction shall be made on account of any royalty," can have any application. Why, it is asked, if the intention of this section is twofold—first to prohibit deductions in future from profits and gains, and secondly to give an independent right to deduct the tax on paying the royalty in the future—is it not broken up into two sub-sections instead of being embodied in one sentence? If there is no necessary nexus between the deduction on payment of the royalty and the prohibition of deduction in respect of the royalty, why connect the two together by the adversative word "but"? Virtually this argument might be expressed by saying that the section should have contained, after the word "estimating," the words "in any year where the latter part of this sub-section has an actual operation." No doubt, if that had been done, any appearance of injustice to the subject would have been avoided, because then he would never be credited with an amount of profit which in reality was greater than that which he enjoyed, except in circumstances when he could have that corresponding right of recoupment which the second part of the sub-section is designed to provide.

The Crown, on the other hand, contends that the first words of this sub-section are quite clear: the second part does not nullify the first or limit its application to cases in which there is an actual power of recoupment; it merely confers on the subject an authority to make deductions if and when circumstances enable him to do so, the risk of which he must take. It is said that the latter part of the section is really couched in quite general terms; that the words "the person paying the royalty" are merely descriptive of the person who is to be authorized to make the deduction; that such a person, a royalty-payer, in other words, "shall be authorized on paying to deduct and retain," &c.; and that the intention is of general application in futuro and has

no modifying effect upon the plain prescriptions of the first part of the sub-section.

If a judge may doubt, whose business is to decide (1), and if a judge, whose business is to enforce Acts of Parliament, may express regret when he does so, I desire to express doubts and regret in deciding, as I do, in favour of the Crown; but, after giving the best attention that I can to the arguments, it appears to me that the injustice which is suggested by the appellants, if it be an injustice, is inherent in a system by which a person is taxed, not upon his actual income for the year of charge, but upon a fictitious income estimated from the facts of previous years, and under which system he obtains his recoupment, if any, by making a deduction from payments made or to be made after he has paid the tax for the year of charge. When the machinery applicable to the taxation of profits and gains was altered, and when, instead of collecting from the owner of these royalties the tax payable upon them, the Crown was enabled to deduct it from somebody else, there was incident to this change of system that appearance, at any rate, of harshness which is complained of here. This could only be avoided by recasting the section, and by expressing that which the appellants say is implied, namely, that the provision forbidding deductions shall not be operative unless the provisions permitting deduction and retention are operative also; and this the Legislature has not done. The word "but" has furnished the appellants with an opportunity for very serious argument, and there may be doubt in a "but" as there is virtue in an "if"; but in this case the doubt is not sufficient to warrant me in virtually reconstructing the section so as to make it clear, as the appellants say it is intended to be clear, that a person using a patent is not prohibited from deducting royalties from the gross profits, except where he can deduct and retain as against the person owning the patent. It is said that virtually the Crown is claiming the tax twice over, because in the years 1904, 1905, and 1906 presumably the recipient of the royalty was made

(1) "It is the business of judges to send into the world, not doubts, but decisions": per Sir William Scott, *Lindo* v. *Belisario*, (1795) 1 Hagg. Cons. 216, at p. 220.

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to pay under Sched. D, and apparently in 1907 the appellants were made to pay on an average of the royalties paid during the same three years. But I think this is an appearance only and not a real exaction of tax on the same sum twice over. It is an incident of the system of making a calculation on the figures of those three years and then calling it what it is not, the income of the year of charge; consequently the claim is not open to that objection.

I come to the conclusion, therefore, that the decision of the Commissioners was right, and the appeal must be dismissed.

*Appeal dismissed.*

Solicitors for appellants: *Bristows, Cooke & Carpmael.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. H. G.

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*March* 1.

## EARL OF MOUNT EDGCUMBE *v.* COMMISSIONERS OF INLAND REVENUE.

*Revenue—Stamp—Lease for a fixed Term of Years if certain Persons should so long live—Contingency of Lives dropping within the Term—Indefinite Term—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

A lease for a term of ninety-nine years if A., B., and C. should so long live is a lease for a term which "exceeds thirty-five years," and not a lease for an "indefinite" term, within the meaning of Sched. I. to the Stamp Act, 1891.

CASE stated by the Commissioners of Inland Revenue.

1. On March 16, 1910, an instrument was presented on behalf of the Earl of Mount Edgcumbe (hereinafter called the appellant) to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

2. The instrument in question was an indenture dated March 14, 1910, made between the Earl of Mount Edgcumbe of the one part and Annie Eliza Laity, of Plymouth, in the county

of Devon, therein called the lessee, of the other part, and the material portions of the instrument were in the following terms. It witnessed "that in consideration of the term of years granted in the tenement hereinafter demised (created by a lease bearing date 20th day of April, 1909, and which said lease was made between the said Earl of the one part and the said lessee of the other part) being merged by the regrant hereinafter contained of the same tenement to the said lessee . . . . And in consideration of all covenants for renewal binding the said Earl in that behalf and in consideration of the sum of 12*l.* 10*s.* of sterling money now paid by the said lessee to the said Earl the receipt whereof is hereby acknowledged and in consideration of the rent hereinafter reserved and of the lessee's covenants hereinafter contained he the said Earl . . . . doth grant demise and lease unto the said lessee" certain dwelling-houses situate in the parish of East Stonehouse in the county of Devon "To have and to hold all and singular the premises hereby demised with the appurtenances unto the said lessee her executors administrators and assigns henceforth for and during the term of ninety-nine years if Her Royal Highness Princess Beatrice of Saxe Coburg Gotha now aged about twenty-five years Frances Bassett now aged five years daughter of Albert Wilberforce Bassett Austin of No. 1 Parkvedra Terrace Truro in the county of Cornwall and His Royal Highness Prince Edward of Wales now aged about fifteen years or any one of them shall so long happen to live Together with a perpetual right of renewal of the said term upon and under such terms and conditions as are hereinafter expressed Rendering therefor yearly during the said term unto the said Earl his heirs and assigns the rent or sum of 12*s.* 6*d.* of lawful English money by equal half-yearly payments on Lady Day and Michaelmas Day And also rendering unto the said Earl his heirs and assigns within six calendar months after the decease of each one of the three cestuis que vie hereinbefore named the sum of 1*l.* 5*s.* of like lawful English money for and in the name of an heriot or farlief"—then followed the covenants by the lessee and by the Earl, and the deed continued: "Provided always and it is hereby agreed and declared that this and every other lease

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which at any time hereafter shall be renewed in pursuance of these presents shall from time to time for ever hereafter be renewable for the like term of ninety-nine years determinable on the deaths of the three cestuis que vie as aforesaid and shall upon the request and at the cost and charges of the lessee for the time being be so renewed by the said Earl his heirs and assigns Upon payment by such lessee for the time being to the said Earl his heirs and assigns of such sum or sums of money as a fine for each and every life to be nominated or added upon such renewal as shall be after the rate of 20*s.* for every 1*s.* of rent hereby reserved which said renewed lease so from time to time to be made and granted shall be under the same rent and with the like conditions and agreements (mutatis mutandis) as are in these presents reserved expressed and contained."

3. The instrument was duly executed by the appellant.

4. The instrument was admittedly rightly assessed by the Commissioners under the head "Lease or Tack," par. (3.) in Sched. I. to the Stamp Act, 1891 (1), and so far as the assessment of 1*s.* 6*d.* in respect of the 12*l.* 10*s.* then paid was concerned no exception was taken to it, but in assessing duty in respect of the rent and heriots (which did not exceed 5*l.* per annum) the appellant contended that the term was indefinite and that the scale applicable was the first column in the scale of charges under the above head and sub-head, involving a duty of 6*d.*, whereas the Commissioners were of opinion that the term was ninety-nine years and the scale applicable was the

(1) By Sched. I. to the Stamp Act, 1891, tit. "Lease or Tack," par. (3.), a lease for any definite term exceeding a year, or for any indefinite term, of any lands, tenements, or heritable subjects, the consideration or any part of the consideration of which is any rent, is chargeable with stamp duty,

"If the rent, whether reserved as a yearly rent or otherwise, is at a rate or average rate:

| | If the term does not exceed 35 years or is indefinite. | If the term exceeds 35 years but does not exceed 100 years. | If the term exceeds 100 years. |
|---|---|---|---|
| | £ *s.* *d.* | £ *s.* *d* | £ *s.* *d.* |
| Not exceeding 5*l.* per annum .. | 0 0 6 | 0 3 0 | 0 6 0" |

second column in that scale, involving a duty of 3*s.*, and they so assessed it.

The questions for the opinion of the Court were:

(1.) Whether the assessment of the Commissioners was right.

(2.) If not, with what duty the instrument was chargeable.

*Clauson, K.C.*, and *W. G. Brown*, for the appellant. The term granted by this lease is not a term for ninety-nine years defeasible in the event of death, and giving the lessor a right of re-entry on the occurrence of that event. It is in its inception to last for an indefinite time. It is therefore chargeable with the lowest rate of stamp duty, and in practice this form of lease, which is a very common form in Devonshire, has been so treated by the Revenue authorities for many years past. In *Doe* d. *Pemberton* v. *Roe* (1) a rule was moved for calling on certain tenants in possession of premises to enter into a rule for giving up possession in accordance with 1 Geo. 4, c. 87, s. 1. It appeared that the tenants held under a lease for "ninety-nine years if R. G., W. G., and R. G. junior, or any or either of them should so long live." Lord Tenterden pointed out that the statute only applied to cases where the holding was for "any term or number of years certain or from year to year," and held that the lease in question was not a holding for any term or number of years certain, and he accordingly refused the rule. The former Stamp Acts have uniformly treated a lease of this kind as being a lease for an indefinite term. Thus 48 Geo. 3, c. 149, Schedule, Part I., tit. "Lease," speaks of a "term of years determinable with a life or lives" as something distinct from a "term absolute." The same distinction is drawn in 55 Geo. 3, c. 184, and in 13 & 14 Vict. c. 97. By the 17 & 18 Vict. c. 83 leases for terms of years are divided into three classes, those in which the term is less than thirty-five years, those in which it is between thirty-five years and 100, and those in which it exceeds 100, the highest rate of duty being charged on the longest term. Then under tit. "Conveyance" it provides that the duty on a conveyance "in consideration of an annual sum payable in perpetuity or

(1) (1827) 7 B. & C. 2.

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for any indefinite period" shall be the same as on leases for more than 100 years. But it exempts from that highest scale of duty "any lease or tack for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three." The draftsman of that Act evidently thought that but for the exemption a lease for years determinable on lives would be a lease for an indefinite period. A lease of which the term is indefinite includes such a lease as the present, which is in reality a lease for lives, and in which the reference to ninety-nine years is an artificial introduction, the parties not contemplating the possibility of the lease lasting for so long a time. This lease could not be put higher than a lease which *may* exceed thirty-five years, whereas the words at the head of column 2 in the schedule to the Act of 1891 are "If the term exceeds thirty-five years." In practice these leases are always renewed on the dropping of the first life, a fresh life being added. And it is found that a life generally lasts about eighteen years. In Alpe's Stamp Duties, 11th ed., p. 148, it is stated that "A lease for a term of years determinable upon the dropping of a life or lives is a lease for an "indefinite term" chargeable with the lowest rate of duty."

*Sir John Simon*, *S.-G.*, and *W. Finlay*, for the Crown. This is a lease for a definite term exceeding thirty-five years. It may perhaps be said that if it is not a lease for an indefinite term there is no term which would answer that description. But the answer is that the words at the head of column 1, "If the term . . . . is indefinite," are sufficiently satisfied by supposing them to refer to a lease from year to year. Such a term will in the absence of notice to quit go on indefinitely, and at the time of stamping the instrument no one can say what the term is. But in the case of the present lease the term is fixed though something may happen which will cause it to be determined sooner. In Woodfall's Landlord and Tenant, 18th ed., p. 167, it is said "The word 'term' in a covenant in a lease may signify either the time or the estate granted." It is in the former sense that word is used in the schedule to the Stamp Act. The term of the grant is one thing, the period during which that term may be enjoyed is another. It does not follow that, because the term

in the sense of the estate granted may come to an end before the time mentioned in the lease, the term in the sense of the time is not definite. In Williams' Real Property, 20th ed., p. 493, it is said "There is no limit to the number of years for which a lease may be granted, a lease may be made for 99, 100, 1000 or any other number of years; the only requisite on this point is that there be a definite period of time fixed in the lease, at which the term granted must end; and it is this fixed period of ending which distinguishes a *term* from an estate of freehold. Thus a lease to A. for his life is a conveyance of an estate of freehold, and must be carried into effect by the proper method for conveying the legal seisin; but a lease to A. for ninety-nine years, if he shall so long live, gives him only a term of years, on account of the absolute certainty of the determination of the interest granted at a given time *fixed in the lease*." Suppose the term granted was thirty-six years if a hundred named persons should so long live, could it be said that the term was indefinite and not to be charged on the scale for terms between thirty-five and a hundred years although it was absolutely certain that some of the lives would last beyond the thirty-six years? And if such a term could not be said to be indefinite, then neither can the term in the present case.

*Clauson, K.C.*, in reply.

HAMILTON J. This appeal relates to the stamp duty chargeable upon an instrument, the habendum to which in substance is: To have and to hold for and during the term of ninety-nine years if A., now aged twenty-five, B., now aged about five, and C., now aged about fifteen, or any one of them shall so long happen to live. The Crown successfully claimed before the Commissioners that it was chargeable with stamp duty under column 2 of the varying rates which are attached to "Lease or Tack," par. (3.) in the schedule to the Stamp Act, 1891. The question is whether it comes within that column. The column is headed "If the term exceeds 35 years but does not exceed 100 years." The event that this term may exceed 100 years may be neglected; therefore the matter turns on the words "If the term exceeds thirty-five years." Logically the appellant

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need not bring himself within any column, but for reasons which are obvious he supports his answer to the Crown's contention by the affirmative argument that he is really within the heading of column 1, "If the term does not exceed 35 years or is indefinite." I think that the heading of column 1 might have been otherwise expressed by saying "If the term is not defined at all, or is so defined as not to exceed thirty-five years," and that in both columns "If the term exceeds" means "If the time mentioned in the instrument exceeds." Can it be predicated of this instrument that the term or time exceeds thirty-five years? That may be tested by asking, Can it be predicated of it that the term or time is not defined in it at all? I think it can be predicated of this instrument that the term exceeds thirty-five years. The words are "for and during the term of ninety-nine years," and I do not think it is possible to say of this instrument that the term or time is not defined in it at all. It is said, justly, that you must read the whole habendum together, and, so reading it, give effect to the words which follow, "if" the three persons named "or any one of them shall so long happen to live." Although we cannot now tell for what length of time the term or interest will be enjoyed, still, as the instrument has to be presented for stamp duty and the duty has to be paid at the time of the grant of the lease, it does not seem a complete answer to say "We do not know how long the interest will last." Conceivably the interest may last for the whole ninety-nine years. But I see no reason to doubt that when the Legislature said "If the term exceeds thirty-five years" it meant "If the instrument states that the term is to be measured by a definite number of years, and that definite number of years exceeds thirty-five." The term is none the less definitely stated and in excess of thirty-five years because there are certain concurrent incidents upon which the continuance of the chattel interest is dependent, although all of them may cease within the time named. If it could be shewn that the word "term" in the schedule was used as a term of art, or that the headings to these columns define in the language of conveyancers the classes of instruments that come before the stamp officers, I might have been bound to give effect to what I

understand to be the case, that from the point of view of a conveyancer it is immaterial whether the term be for years, if lives so long endure, or simply for lives, except for the reason, alien to the present point, that in the one case a chattel interest is created and in the other an interest of freehold. The Acts of George III. and George IV., to which attention was drawn, do not assist me. That Parliament may have deemed a lease for lives, or for years if certain lives so long endure, distinguishable as a matter of classification from terms absolute, does not advance the matter. Nor does the decision in *Doe* d. *Pemberton* v. *Roe* (1), because there the interest of the tenant was not for a "term or number of years certain," but for a term of years uncertain and liable to come to an end if the lives dropped within the period named; whereas here we are dealing with a term of years definite, and I think the term is defined when the instrument is granted and not when the event is ascertained. More perhaps might be made of the provision in the schedule to the Act of 1854 (17 & 18 Vict. c. 83). There the word "indefinite" is used, and used in connection with leases for lives or for a term of years determinable with lives. If I were satisfied that the Legislature there used the words "conveyance in consideration of an annual sum payable for an indefinite period" as an expression which would include a lease for a term of years determinable with lives, that would go some distance towards the conclusion that the word "indefinite" in the present schedule ought to be interpreted in a similar way. Logically I should take the exempted conveyances in the schedule to the Act of 1854 to be such as would be within the definition of the conveyances chargeable but for the exemption; but as the exemption goes on to say with what duty these exempted leases and grants shall be charged, it is not a mere saving, and cannot be treated as a parliamentary admission that the word "indefinite" would have included leases for years determinable upon lives unless there had been express words to prevent it. The practice of the Inland Revenue authorities is not a matter that I can take into account. The meaning of the Act has to be ascertained from its words according to the plain meaning of its language, and when I find in the instrument the

(1) 7 B. & C. 2.

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very words that satisfy the heading of the column in the schedule I do not think I should be warranted in giving them any interpretation that would prevent the rate of stamp duty charged from applying.

*Appeal dismissed.*

Solicitors for appellant: *Bell, Brodrick & Gray, for Bewes & Dickinson, Stonehouse.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

J. F. C.

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1911

*April* 3.

## LONDON COUNTY COUNCIL *v.* FAIRBANK.

*Revenue—Licence—Hackney Carriage—What constitutes "keeping" a Carriage—Customs and Inland Revenue Act*, 1869 (32 & 33 *Vict. c.* 14), *s.* 27.

By s. 27 of the Customs and Inland Revenue Act, 1869, "Every person who . . . . shall keep a greater number of carriages . . . . than he shall be authorised to . . . . keep by any licence or licences" granted to him under that Act shall be liable to a penalty:—

*Held*, that a cab proprietor who has in reserve in his yard a number of spare cabs ready for use and intended to be used if and when occasion requires does not "keep" them within the meaning of that section until he in fact begins to use them.

CASE stated by a metropolitan police magistrate.

The respondent was summoned on an information charging that he on June 1, 1910, at Amberley Wharves, in the borough of Paddington, did keep 104 carriages, being a greater number than he was authorized to keep by any licence or licences granted to him under the Customs and Inland Revenue Act, 1869, as amended by the Customs and Inland Revenue Act, 1888.

At the hearing of the information the following facts were proved or admitted:—

The respondent was a proprietor of cabs and a coachbuilder, and it was proved by extracts from the register of hackney carriage licences of the Metropolitan Police that he had 102 hackney carriages on June 1, 1910, and that he had in force on that date 102 plates (not counting duplicates which are occasionally

issued to replace damaged plates) which had been issued to him from Scotland Yard. He owned and kept on his premises between January 1 and June 1 a number of cabs varying between 100 and 104. He had sold one or two during that period, but had 102 on June 1. The number actually used for hire each day varied according to the demand. The greatest number used for hire on any one day during the six months was ninety-four. His practice was to keep in the yard a certain quantity always in reserve ready to be drawn upon as occasion required. From seven to ten in addition to the ninety-four were kept on the premises during the said six months as part of the reserve, but were never in fact drawn upon. Eight were there on June 1. They had plates and the respondent held licences from the police in respect of them. They were ready and fit for use and were cleaned from time to time under the direction of the respondent's foreman, but were kept in a coach-house which held just ten and which was kept locked. The respondent's foreman had charge of them and had the custody of the key. None of the seven or ten were in fact used for hire during the six months. Revenue licences for eighty-five cabs were taken out by the respondent on February 11, 1910, and for nine cabs on May 28, 1910, making ninety-four, which was the number held by him on June 1.

For the appellants it was contended that the respondent should have taken out licences for the whole number of cabs which he kept upon his premises and for which he held police licences, and that he had "kept" within the meaning of s. 27 of the Act of 1869 a greater number of carriages than he was authorized to keep by the licences granted to him under the Act, whether he actually used them for hire or not.

For the respondent it was contended that "keeping" meant "user," and that he was not in fact using more than ninety-four cabs, and that he was not liable for the revenue duty until the actual use of a cab.

It was admitted by the appellants that it was not the practice of the Inland Revenue authorities to demand payment of the licence in the case of a private owner unless and until the carriage was used, but they contended that, inasmuch as the

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duty was lower in the case of a hackney carriage than in the case of a carriage not let for hire, no inference unfavourable to them could be drawn from this fact.

The magistrate was of opinion that on the above facts there was no evidence upon which he could hold that the respondent was using a greater number of cabs than ninety-four within the meaning of the section, and that the word "keep" meant "use." He accordingly dismissed the summons.

*Danckwerts*, K.C., and *Cecil Walsh*, for the appellants. Having a carriage ready for use when required amounts to keeping it within the meaning of the Customs and Inland Revenue Act, 1869; and here the reserve cabs were ready for use, having been licensed by the police and provided with plates. It is not necessary that the person sought to be taxed should in fact use the carriage; it is enough that he keeps it for use, that is with the intention of using it when wanted. In *Davey* v. *Thompson* (1), where the owner of a carriage, which had accidentally become disabled during the year for which an excise licence had been duly taken out, was accommodated by his coachbuilder, during the repair of the carriage, with the use of another carriage without payment, the coachbuilder was held not liable to take out a licence in respect of the carriage so lent. But the ground of the decision was that, though he kept it for use, he so kept it for use not by himself, but by his customers. A. L. Smith J. said, "I think the meaning of 'keep' there is keep for use." And had the coachbuilder kept the carriage for use by himself the decision would have been otherwise. Here the respondent clearly kept the reserve cabs for use by himself.

[BANKES J. But did he keep them as hackney carriages? From the definition of hackney carriage in s. 4, sub-s. 3, of the Act of 1888—"'Hackney carriage' means any carriage standing or plying for hire"—it would seem that these particular cabs never came within that category.]

Under the Act of 1869 no distinction was drawn between a hackney carriage and any other form of carriage. They paid the same duty. Under the Act of 1888 hackney carriages are

(1) (1886) 54 L. T. 495.

now taxed at a lower rate; they are entitled to a partial exemption from the duty to which they were formerly liable. But it is not for the revenue officer, but for the person taxed, to shew that he is entitled to that exemption. It could not be disputed that these cabs were carriages, and, apart from the question of whether they were kept or not, the only effect of failure to shew that they were hackney carriages within the definition would be that they would lose the benefit of the lower rate and become chargeable with the full carriage tax.

No counsel appeared upon the other side.

LORD ALVERSTONE C.J. The facts of this case are somewhat peculiar. The respondent took out revenue licences for ninety-four cabs. He had in his yard a number varying from 102 to 104. But it is to be observed that he was a carriage builder, and he from time to time sold cabs built by him. Therefore the mere possession of unlicensed cabs would not be sufficient to shew that he kept them. That was really decided in the case of *Davey* v. *Thompson* (1), where it was sought to tax a coachbuilder for a carriage which he had lent to a customer while his own carriage was being repaired, and the Court held that the coachbuilder did not keep the carriage within the meaning of the statute. Here the case finds that none of the reserve cabs, seven to ten in number, were ever in fact used during the six months in respect of which the tax is claimed. Mr. Danckwerts has argued that that is immaterial, and that, provided the cabs in question were kept in all respects ready to be used if at any time one of the other cabs broke down, they were being kept within the meaning of the section. The section, s. 27, says that "Every person who shall . . . . keep a greater number of carriages than he shall be authorised to . . . . keep" shall be liable to a penalty. It is to be noticed that hackney carriages are not there specially referred to, the reason being that in that Act no distinction for purposes of taxation was drawn between hackney carriages and any other class of carriages. The special tax on hackney carriages was imposed by the later Act of 1888. But in order to render the respondent liable he must be shewn to have kept "a

(1) 54 L. T. 495.

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greater number of carriages," meaning thereby hackney carriages, than he was licensed to keep. The question is, When did he begin to keep the hackney carriages which he owned? As regards the ninety-four he undoubtedly kept them during the whole of the preceding six months. But did he keep the reserve hackney carriages which were locked up in his coach-house? It seems to me that until a carriage stands or plies for hire it is not a hackney carriage and is not the subject of taxation as such. If these had been private carriages lying unused in the coach-house there can be no question but that the owner would not have been liable even though he may have intended to use them in the future if occasion demanded. And it seems to me that in order to prove that the magistrate's decision here was wrong it is necessary to alter the definition of a hackney carriage and say that it means not only a carriage standing or plying for hire, but a carriage standing or plying for hire or being ready for use for standing or plying for hire. Mr. Danckwerts pressed us with the fact that the respondent had gone to the expense of putting plates on these cabs and paying for police licences for them. But that does not really advance the argument. It does not go to shew that he was keeping as hackney carriages cabs which had never in fact gone out of the yard. I quite agree that if any of them had gone out and taken the place of another cab the decision ought to be different. But here there was no evidence that the seven to ten cabs in the coach-house were hackney carriages or were kept by the respondent as such. The appeal must be dismissed.

BRAY J. I am of the same opinion. We must take it as found upon this case that these reserve cabs were never in fact used, and never stood or plied for hire. Under those circumstances are they subject to the tax? In my opinion they are not. Sect. 22, which is the section requiring persons keeping servants, carriages, &c., to make declarations, contemplates the tax as being imposed in respect of the use of the taxable subject. It begins "Every person employing any male servant." Mr. Danckwerts conceded that that did not mean merely entering into an agreement with a man, or paying him wages without

more. It means using him as a servant. Later on it deals with "wearing or using any armorial bearings." There must be an actual user to render a person liable to the tax. And when it speaks of "keeping any carriage" I think we ought to construe the word "keeping" in the same way. Keeping does not mean merely having in one's possession, but actually using. And in my opinion the tax on a carriage is not payable until it is actually used.

BANKES J. I agree. I wish to add that under s. 22 of the Act of 1869 every person who keeps a carriage is required to make a declaration in the form provided by the Commissioners as to the number of carriages kept by him. The form of declaration so provided by the Commissioners to be used in the case of a hackney carriage differs from the form to be used in the case of an ordinary domestic carriage. The former commences with the words "This declaration must be duly made and licences obtained before the end of January in the above year or within twenty-one days after first becoming liable to the duty by every person keeping any hackney carriage." The form defines the term "hackney carriage" as meaning "any vehicle drawn by a horse or mule or horses or mules and standing or plying for hire." And in the directions on the back of the form it is stated that "If at any time during the remainder of the year, after making this return, a person . . . . takes an additional hackney carriage . . . . into use the necessary licence . . . . must be taken out within twenty-one days." That shews that, whatever the rule may be as to the liability of a person who keeps an ordinary domestic carriage for use, in the sense of keeping it with the intention of using it when required, the owner of a hackney carriage first becomes liable to the duty when he takes it into use by causing it to stand or ply for hire.

*Appeal dismissed.*

Solicitor for appellants: *Edward Tanner.*

J. F. C.

K. B. D. 1910 *Nov.* 29; *Dec.* 21. C. A. 1911 *Feb.* 22, 23, 24.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

## METROPOLITAN WATER BOARD *v.* COLLEY'S PATENTS, LIMITED.

*London—Water Supply—Factory—"Domestic Purposes"—"Trade Purposes"—Water supplied for Lavatories and Water Closets used by Employees—Payment on Rateable Value—Metropolitan Water Board (Charges) Act,* 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 9, 16, 20, 25.

The defendants were the occupiers of a factory within the metropolitan area, in which they manufactured railway tickets and paper. Water was supplied to the factory by the plaintiffs, the Metropolitan Water Board, and there used for drinking and washing purposes by the defendants' workpeople, and for cleansing urinals and water closets used by them. No one resided upon the premises:—

*Held* (by Farwell L.J. and Kennedy L.J., Vaughan Williams L.J. dissenting), that the plaintiffs were entitled to charge for the water so supplied as for water supplied for "domestic purposes" upon the rateable value of the factory.

Appeal to a Divisional Court (Phillimore J. and Lord Coleridge J.) from a judgment of the judge of the Westminster County Court.

The action in the county court was brought by the plaintiffs, the Metropolitan Water Board, to recover charges in respect of water supplied by them to the defendants from March, 1908, to March, 1909.

The defendants were the occupiers of a factory within the metropolitan area, in which they manufactured railway tickets and paper. Water was supplied to this factory by the plaintiffs, the bulk of which was used therein for drinking and lavatory purposes by the defendants' workpeople, and for cleansing urinals and water closets used by them. It appeared that some of the water was also used for cooling tanks in connection with a gas engine employed in the manufacturing processes. No one resided upon the premises. The plaintiffs claimed under the Metropolitan Water Board (Charges) Act, 1907, to be paid in respect of the water so supplied as for water supplied for "domestic purposes" under s. 8 of the Act upon the rateable value of the defendants' premises.

The county court judge held that the whole of the water so supplied was supplied, not for domestic purposes, but for trade purposes, and therefore that the plaintiffs were not entitled to charge the defendants for such supply upon the rateable value of the premises. He consequently gave judgment for the defendants. (1)

The plaintiffs appealed.

*Danckwerts, K.C.*, and *A. B. Shaw*, for the plaintiffs.

*C. A. Russell, K.C.*, and *McCurdy*, for the defendants.

*Cur. adv. vult.*

1910. Dec. 21. The following judgment was read by

PHILLIMORE J. In this case we have to determine whether or not the Metropolitan Water Board can recover from the defendants, Colley's Patents, Limited, for the supply of water to their premises according to the rateable value of their premises, or whether the defendants can claim to pay by meter.

The defendants carry on a factory in a building within the metropolitan area, and they require water for their employees to use for drinking and personal washing and to cleanse the urinals and closets which the employees use. No one resides upon the premises. It appears probable that some water is used for manufacturing purposes, and some, I presume, for the purpose of cleansing the floors and so forth. The Board contends that this is a supply of water for domestic purposes under s. 8 of the Metropolitan Water Board (Charges) Act, 1907. The defendants contend that this is not a use for domestic purposes, and that, even if it might appear to be such a use under s. 8, standing by itself, it is declared not to be a use for domestic purposes by s. 25. This section says that for the purposes of this Act the expression "domestic purposes" shall not include a supply of water for any of the following purposes, namely, among other things, "any trade, manufacture, or business."

The points thus raised appear to be two: First, is this use such as would be deemed to be a use for domestic purposes according to the general legislation in these matters? Secondly,

(1) For material sections of the Metropolitan Water Board (Charges) Act, 1907, see note at end of report.

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if so, does s. 25, either by exception take this use, though domestic, out of the category of domestic purposes, as dealt with by this Act, or, as the argument may otherwise be put, declare or indicate that this is not a use for domestic purposes? As to both these questions the decision of Neville J. in *South Suburban Gas Co.* v. *Metropolitan Water Board* (1) is in point, and is adverse to the defendants. That case was discussed before and by my brother Bucknill and myself in *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (2), and was considered when our decision came before the Court of Appeal. (3) I have doubted whether I ought not simply to shelter myself under that judgment; but, after reference to my previous criticism, not so much of the learned judge's decision upon the facts admitted or proved before him as upon the wisdom of one of the admissions, I think that I ought to apply my mind to the case and give my decision independently.

Having thought the matter over again I retain my opinion that "domestic" does not mean civilized or domesticated or something appertaining to man, but means something to do with man as occupying or using a house or dwelling. Such occupation need not be for day and night. In the previous case I gave certain examples of an occupation of premises without pernoctation which might yet make the use of water in connection with that occupation domestic. So, if a man has a bedroom and uses his club all day, his use of water in his club may well be a use for domestic purposes. But if he is brought upon the premises, not for residential purposes, but for railway purposes, or in connection with any trade, manufacture, or business, is his use of water for the same objects for which, if he was at home, he would use it a use for domestic purposes? This is a puzzle. If the use can be brought under the expression "railway purposes" the Court of Appeal says no. Otherwise that Court has left the matter open. No doubt, if the trade or business is one of providing domestic comforts, the water authority can insist (if it desires to claim upon the rateable value) that the purpose is none the less domestic because it is

(1) [1909] 2 Ch. 666. (2) [1910] 1 K. B. 804.
(3) [1910] 2 K. B. 890.

provided for in the way of trade. This is clearly stated by Buckley J. (as he then was) in *South-West Suburban Water Co.* v. *St. Marylebone Union.* (1) Perhaps it is as well in passing to notice that the actual judgment in that case ordered payment for the water by meter. But, if it is expedient to provide for workmen or clerks engaged in any trade, manufacture, or business such sanitary conveniences as they would have at home, possibly still more if it be a necessary condition imposed by law without which the trade, manufacture, or business cannot be carried on, is this user of water a use for domestic purposes or for the purposes of the trade, manufacture, or business? Drinking water seems to me not so strong a case for the Board as the water I have just mentioned. Water may as well be drunk from a river or a spring or an artificial fountain (mentioned in s. 25 of this Act), or by a country cottager from and by a well in his garden, as in a house. Hand-washing water is required either that the hands may be clean for factory purposes or may be cleansed from the soiling which the work of the factory has caused. This also is a weak case for the Board. The strongest instance on which the Board can rely is the cleansing of the sanitary conveniences.

A point was made on behalf of the Board under s. 9. It appears from that section that a house may be occupied solely for the purposes of a trade or business or of a profession or calling and yet require water for a domestic purpose. The words "profession or calling" are not in s. 25, and the word "manufacture," which is in s. 25, is left out in s. 9, which shews how difficult it is to fit these sections together. So far as the words "profession or calling" are concerned, I can conceive cases of studios, chambers, houses where doctors live all day, with their brass plates on the door, which might not be held to come under s. 25, the occupation being so nearly residential that the use of water therein would be domestic. For such cases equitable provision may be made by s. 9. I do not know whether the section would apply to cases where a bank director or a porter has to sleep upon the premises. It might apply to cases where the staff liked to dine and have their meals cooked upon the trade or

(1) [1904] 2 K. B. 174

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business premises. I do not feel that s. 9 drives me to any conclusion with regard to this case.

Upon the whole, I am of opinion that there is not in the use of these closets and urinals a sufficient residential element to warrant the change upon previous practice which the Water Board here seeks to introduce, nor any argument strong enough to make me differ from the learned county court judge, and that this appeal fails.

I regret that in coming to this conclusion I find myself differing from my brother, but as the case is one of considerable importance, and will probably go to the Court of Appeal, it is right that that Court should have the benefit of our separate judgments.

The following judgment was read by

LORD COLERIDGE J. The defendants carry on a trade or manufacture in a building which also contains lavatories and water closets for the workmen's use, and a supply of water used for drinking purposes. The building is left empty at night without a caretaker. The defendants contend that the water supplied to them by the plaintiffs for these purposes is supplied for other than domestic purposes, and claim to be supplied by meter. The plaintiffs contend that the water so supplied is used for domestic purposes, and claim to rate the defendants on their rateable value.

By the Metropolitan Water Board (Charges) Act, 1907, s. 8, the owner or occupier of any house or building or part of a house or building occupied as a separate tenement is entitled to require a supply of water for domestic purposes. Sect. 9 says: "Where . . . . the Board furnish a supply of water for domestic purposes to any house or building or part of a house or building occupied solely for the purposes of any trade or business" in certain cases a rebate is allowed. By s. 25 the expression "domestic purposes" is to be deemed to include water closets and baths constructed or fitted so as not to contain more than eighty gallons, but shall not include a supply of water for certain purposes, among which "railway purposes" are included.

It is now clear law that the true test of what are "domestic purposes" is not the character of the building but the use to

which the water is put. Thus in the case of a school which used water for a swimming bath, for which a fee was charged, and which was described in the prospectus as an attraction, it was held that this was not a domestic purpose: *Barnard Castle Urban Council* v. *Wilson*. (1)

In *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (2) water supplied for urinals at a railway station was held to come within the term "railway purposes," and therefore within the exception in s. 25. Such a supply railway companies are bound by law to provide as being "reasonable facilities for the receiving and forwarding of traffic" under s. 2 of the Railway and Canal Traffic Act, 1854, and it is necessary for the carrying on of their business that they should be provided. It is said that this reasoning applies with equal force to the present case because the defendants are bound by statute to provide certain water closets, and therefore it is reasonable, and indeed necessary, for the carrying on of their business that such conveniences should be provided. A distinction between the two cases seems to lie in this, that the words "railway purposes" do not import necessarily the element of domesticity. The travellers who use the conveniences are a fleeting body, not in any sense permanently on the premises, and in no sense can they be termed inmates or persons regularly or permanently present on the premises. I pass by the fact that in *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (2) there were water closets for porters, as that fact by common consent was not considered in arriving at the judgment. If, then, the use of the water is the first thing to look at, in this case the use is at first sight domestic; water for drinking, lavatory, and water closet accommodation is prima facie being used for a domestic purpose. But that simple definition has been extended by the Courts so that the question is now a complicated one. Water so used is not used for a domestic purpose if the persons using it use it in connection with or as ancillary to a business. If the washing, the drinking, and the sanitary use of the water be for the workman's private convenience only, the fact that the water so used is supplied to a factory, even left at

(1) [1902] 2 Ch. 746. (2) [1910] 2 K. B. 890.

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night without a caretaker, does not take it out of the description "domestic purpose" where the workman is on the premises at regular work. That fact supplies the necessary ingredient of domesticity. This view is supported by the judgment of Neville J. in *South Suburban Gas Co.* v. *Metropolitan Water Board.* (1) It would be otherwise when the persons using the water were mere passing travellers. I think where these facts exist that the water is used for domestic purposes. In one sense every water closet for any workman employed on any premises for an appreciable time is in connection with the business. But to exclude the supply of such water from the definition of a domestic supply, something more, I think, must be shewn in the user of the water to connect such user in some special manner with the business; in other words, it must be shewn that the water was used for the purposes of the business, and not merely for the ordinary health, cleanliness, comfort, or convenience of those engaged in the business. For these reasons, in my opinion, the appeal should be allowed.

PHILLIMORE J. As the Court differs, the judgment of the Court below will stand, and according to practice the appeal will be dismissed with costs, but there will be leave to appeal.

*Appeal dismissed. Leave to appeal granted.*

J. E. A.

The plaintiffs appealed to the Court of Appeal.

1911. Feb. 22, 23, 24. *Danckwerts, K.C.*, and *A. B. Shaw*, for the plaintiffs. The supply of water in this case was a supply for "domestic purposes" within s. 8 of the Metropolitan Water Board (Charges) Act, 1907. One object of that Act was to establish uniformity of charges for water over the metropolitan area in place of the variety of charges which had previously existed. There are only two possible modes of charging, one being on amount consumed as measured by a meter, the other being on rateable value. A disadvantage of supply for domestic

(1) [1909] 2 Ch. 666.

purposes by meter from a sanitary point of view is that people who do not set much store on cleanliness will be tempted to economize by stinting their use of the water, and consequently the plan of charging on the rateable value of premises supplied for domestic purposes was adopted, a plan which no doubt forms a rough and ready test of the amount of the water likely to be consumed. Provision is separately made by s. 16 for the supply of water for trade or business purposes to premises used for those purposes by meter. Sect. 9 of the Act clearly imports that the Legislature contemplated that there might be a supply for domestic purposes to premises used for trade purposes only, and in such case the charge for the supply will be upon rateable value. The contention for the defendants really leaves no scope for the operation of that section. It is quite clear upon the authorities that the answer to the question whether the purposes for which water is used are domestic purposes within the meaning of the Act or not does not depend on the character of the premises or on the question whether the premises are in the nature of a dwelling-house, or whether any one sleeps on them, but on the nature of the purposes themselves. The use of water in a club by members who only use it in the daytime is clearly for domestic purposes. Premises may be occupied only in the daytime for the purposes of a trade or business, as in the case of factories or shops or offices, and yet the water supplied to them for such purposes as in the present case will be none the less supplied for purposes in their nature domestic. Sect. 25 of the Act in terms provides that "domestic purposes" shall include water closets. Domestic purposes do not cease to be such because they are ancillary to trade purposes. It was held in *Smith* v. *Müller* (1) that a boiler used to heat offices or business premises, upon which the owner does not reside, and also to supply warm water for the purpose of cleaning the offices, and for the household purposes of a resident caretaker, is within the exception in s. 4 of the Boiler Explosions Act, 1882, and s. 2 of the Boiler Explosions Act, 1890, which except from the operation of those Acts boilers "used exclusively for domestic purposes." The Legislature probably contemplated that there might be

(1) [1894] 1 Q. B. 192.

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cases where, in the absence of some provision for adjustment of the charges, hardship might arise, as for instance where in the cases of business premises the water supplied for domestic purposes bore a small proportion to the rateable value of the premises, and so they provided for a rebate in such cases by s. 9. The case of *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1) is not an authority in favour of the defendants in the present case. It turned entirely on the provision of s. 25 of the Act by which "railway purposes" are eo nomine excluded from "domestic purposes" and was decided on the basis that the railway companies were under a statutory obligation as railway companies to provide the conveniences for the purposes of which the water was used, though it was doubtful whether that was in truth the case as regards the conveniences provided for the staff. (2) Here it cannot be said that there was any similar obligation, at any rate as regards the lavatories for washing purposes, and the drinking water. The provision of such conveniences may be said to be part of the business of a railway company as carriers of passengers. It is as much part of what the passenger pays for as the provision of stations and refreshment rooms, or even the train itself. [They also cited and discussed *Busby* v. *Chesterfield Waterworks Co.* (3); *Bristol Waterworks Co.* v. *Uren* (4); *West Middlesex Waterworks Co.* v. *Coleman* (5); *Cooke* v. *New River Co.* (6); *Pidgeon* v. *Great Yarmouth Waterworks Co.* (7); *Barnard Castle Urban Council* v. *Wilson* (8); *South-West Suburban Water Co.* v. *St. Marylebone Union* (9); *Chester Waterworks Co.* v. *Chester Union* (10); *Frederick* v. *Bognor Waterworks Co.* (11); *South Suburban Gas Co.* v. *Metropolitan Water Board* (12); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 37, 38, 141; Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 35; Waterworks

(1) [1910] 2 K. B. 890.
(2) See per Kennedy L.J., [1910] 2 K. B. 901, 902.
(3) (1858) E. B. & E. 176.
(4) (1885) 15 Q. B. D. 637.
(5) (1885) 14 Q. B. D. 529.
(6) (1888) 38 Ch. D. 56; (1889) 14 App. Cas. 698.
(7) [1902] 1 K. B. 310.
(8) [1902] 2 Ch. 746.
(9) [1904] 2 K. B. 174.
(10) (1907) 96 L. T. 566; (1908) 98 L. T. 701.
(11) [1909] 1 Ch. 149.
(12) [1909] 2 Ch. 666.

Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 12; Metropolitan Water Board (Charges) Act, 1907, ss. 20, 24, 31, 32.]

*C. A. Russell, K.C.*, and *McCurdy*, for the defendants. The question in the present case really turns entirely upon s. 25 of the Metropolitan Water Board (Charges) Act, 1907, and is concluded in favour of the defendants by the decision of this Court in *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1) It was held in that case that the effect of s. 25 was that a supply of water to water closets at a railway station was not in its nature a supply for domestic purposes, because it was a supply for "railway purposes." So, it is contended here that the supply of water in the present case is not for domestic purposes, because it is for the purposes of a "trade, manufacture, or business." Quite apart from the latter part of s. 25, it is a wrong construction of the Act to say that it makes a supply for water closets in all cases a supply for "domestic purposes." The provision in the former portion of the section is that "in and for the purposes of this Act the expression 'domestic purposes' shall be deemed," not to "mean," but "to include water closets." It was merely intended to remove any doubt as to whether a supply for the purposes of a water closet could be for "domestic purposes." By s. 16 of the Act a right is given to a supply of water for trade or business purposes by meter. The effect of the plaintiffs' construction of the Act would be that they would have a right, if they chose, in such a case as this, to charge for water supplied for trade purposes by measure as well as at the rate of 5 per cent. on the rateable value of the premises, subject to the provisions for a rebate under s. 9, which, however, would only apply in the case of premises of a greater rateable value than 300*l.* Sect. 20 of the Act throws no light on the problem whether the purposes for which the water was supplied in the present case are domestic purposes, but only provides for a case in which there is a supply for such purposes. The narrow view of the effect of the decision in *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1) contended for by the plaintiffs is clearly untenable. It may be said that the provision of sanitary conveniences for passengers is part of the

(1) [1910] 2 K. B. 890.

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business of a railway company, as a carrier of passengers, and part of what the passenger pays for, but the same cannot be said of the provision of separate conveniences for the staff and porters at the station. Similarly, the decision in that case really cannot be put entirely on the ground of there being a statutory obligation on a railway company to provide the conveniences as a reasonable facility for traffic. The railway company were not bound to give the requisite facility by means of water closets. They might have done so by means of earth closets. In this case the defendants were bound under the Public Health (London) Act, 1891, s. 38, sub-s. 1, to provide sanitary conveniences for their workpeople, but it is not sought to put the case merely upon the ground of any statutory obligation, but upon a broader ground. The true explanation of the decision in *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1) is that, upon a reasonable construction of the term "railway purposes," it was held to include the conveniences afforded, as being, in truth, according to the standard prevalent at the present stage of civilization, proper and necessary adjuncts of the business of a railway company. So here the provision of a supply of water for the purposes for which it was used at the defendants' factory may be regarded as a necessary accessory to the conduct of their business.

The construction for which the defendants contend leaves ample scope for the application of s. 9. It is to be observed that that section only speaks of "trade or business," and does not contain the word "manufacture." There may be cases where a liberal and enlightened employer of labour in a factory, or other business premises, goes beyond the provision of what may reasonably be considered necessary conveniences for his workpeople. He may provide for their having meals on the premises by having a kitchen and a dining-room for them, for the purposes of which water would be required. Clearly this would be a domestic purpose. He may even provide baths for his workpeople. Again he may have private apartments for himself for use in the daytime, beyond what are necessary for business purposes, for which water is supplied. In such cases as these

(1) [1910] 2 K. B. 890.

s. 9 would come into play. Again, s. 9 may apply to cases where water is not required on business premises for trade or business purposes, but only for domestic purposes. The decisions under many of the local waterworks Acts as to what were "domestic purposes" may be explained by the fact that under those Acts the only obligation on the part of the company to supply water was for domestic purposes, and the supply of water for trade and similar purposes was optional on their part, and matter of private agreement; and the Courts, therefore, were naturally disposed to give a somewhat liberal construction to the term "domestic purposes." But, in all the cases where purposes were held to be domestic, the persons for whose use the water was provided on premises were capable of being regarded in some sort as members for the time being of one family or "domus." It is impossible, by looking at the mere purpose itself for which the water is used, e.g., for drinking, or flushing purposes, entirely apart from the nature and use of the premises to which the water is supplied, to say whether the purpose is domestic or otherwise. [They also cited *Liskeard Union* v. *Liskeard Waterworks Co.* (1)]

*A. B. Shaw*, for the plaintiffs, in reply. With regard to the argument that the Board's construction of the Act would give power to the Board to charge for water supplied both by measure and on rateable value, the answer is that, though that may be theoretically so, the Legislature may be taken to have assumed that a body in the position of the Water Board would not do anything that was unfair or unreasonable.

VAUGHAN WILLIAMS L.J. I have come to the conclusion that the decision of the Divisional Court, as represented by the judgment of Phillimore J., should be affirmed. The matter has been discussed at some length, and I think I am right in saying that it appeared to be the view of every member of the Court that, if it were not for the provisions contained in s. 9 of the Metropolitan Water Board (Charges) Act, 1907, we should all have been of opinion that the Legislature in passing this Act did not intend the results which the counsel on both sides agreed would follow, if

(1) (1881) 7 Q. B. D. 505.



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we adopted the argument put forward by the Metropolitan Water Board. As I understand, the practical result in that case would be that for all water supplied by the Board to occupied houses or buildings for domestic purposes the Board would, subject to the rebate provided for by s. 9 of the Act, be entitled to charge at the rate of 5 per cent. on the assessed rateable value of those houses or buildings, and I understand that, in addition thereto, it was admitted by their counsel, that they would be entitled to charge, in the case of premises occupied for trade or business purposes, the meter price. It was said that it is not improbable that the Legislature deliberately intended this, because they had confidence that a great public body like the Metropolitan Water Board, who were not making any profit, and who would only desire to do what was best for the community, would not in any way abuse the great powers which had thus been given to them. I mention this early in my judgment, because I do not suppose that any one would question the proposition that, in construing an Act of Parliament, if one finds that the primary and natural meaning of the words used would lead one to a construction involving a result which it is highly improbable, if not impossible, that the Legislature could have intended, then, if the words are reasonably capable of another construction which does not involve the improbability or hardship which the first-mentioned construction would involve, that other construction should be adopted. In this case, apart from the confidence which, as I have said, it is suggested that the Legislature might properly repose in a body such as the Metropolitan Water Board, the construction of this Act contended for by the Board appears to me to lead to a conclusion which it is hardly possible that the Legislature could have intended. Put shortly, it is that a provision which has, throughout all the earlier legislation on the subject of water supply, always appeared, —though no doubt in a somewhat different form,—by which a distinction was drawn between water supplied for domestic purposes and water supplied for trade purposes, is in the case of the metropolis to disappear altogether. I am not forgetting that, when the Waterworks Clauses Act, 1847, was passed, the supply of water for trade purposes could not be claimed as of

right, but was only a matter of agreement; and I am not forgetting the history of the legislation in this respect; but I do say that we ought not easily to arrive at the conclusion to which we are invited to come by the Board, if that conclusion would obliterate the distinction between domestic purposes and purposes other than domestic which has been drawn and has appeared throughout the prior legislation on this subject.

Before dealing with the construction of the Act, I desire to say a word or two about the decision in the case of *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1) In that case the question arose with reference to the supply of water to certain sanitary conveniences at the Norwood station of the railway company. The question was whether ss. 8 and 9 of the Metropolitan Water Board (Charges) Act, 1907, could be applied, in the sense in which it is sought by the Board to apply them, to the sanitary conveniences, water closets, urinals, and such like, which are now to be found at every railway station, at all events, in populous districts. The conclusion at which the Court arrived was that those sections of the Act could not be so applied to the conveniences which in that case were supplied with water by the Board. Why not? The real reason given was, as it appears to me, that a duty rested upon the railway company to provide such conveniences. It was argued that it was a statutory duty, which was arrived at in this way. It was said that the Railway and Canal Traffic Act, 1854, makes it incumbent upon a railway company to make reasonable provisions for traffic, and that it had been held that under that Act reasonable provisions for traffic included such provisions for passenger traffic as well as for goods traffic, and that such provisions for passengers involved the provision of sanitary conveniences for them. But these conveniences for passengers were not the only conveniences which were in question in that case before the Court of Appeal. The water there supplied by the Board was supplied not only for the convenience of passengers, but also, subject to something which Farwell L.J. said in his judgment, for the convenience of the staff. Farwell L.J. said in his judgment (2): "It," the company, "is also, in my opinion, bound to provide

(1) [1910] 2 K. B. 890. (2) [1910] 2 K. B. 899.

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them," i.e., sanitary conveniences, "for the porters; the passengers are entitled to have the assistance of porters, and the porters are on duty for many hours. It is absolutely impossible that the railway company can dispense with these conveniences for the use of the porters as well as for the use of travellers." As I understand those observations, that means that these conveniences for the use of the porters were really provided for the convenience of the passengers. I must say that I think that rather a strained view of the matter. It appears to me that those conveniences were as plainly provided for the convenience of the staff and porters as the others were for the convenience of the passengers. There were two sets of conveniences, one for the passengers, the other for the staff and porters. This point was dealt with, not only by Farwell L.J., but also by Cozens-Hardy M.R. He had arrived at the conclusion that the sanitary conveniences for passengers were supplied in consequence of a statutory obligation towards its passengers on the part of the railway company. I have already said how that obligation was arrived at. It is not a definite and precise obligation, expressly imposed by statute, to provide these particular conveniences, but one which arises out of the obligation to provide reasonable facilities for the traffic, these conveniences being necessary at stations for the use of passengers and such as, upon application to the Railway Commissioners, the company might be compelled to provide. He then proceeded to say: "If that be so, the only difficulty is caused in my mind by the fact that there is in this case a special separate lavatory for the use of the porters and staff. But when Parliament enacted, as they did, that there should be a special treatment of railway companies dealing with every station on their line, I certainly should hesitate to say that it was not also their duty to provide at those stations reasonable accommodation for their staff, and, if necessary, to provide for that staff, in the way which we know it ordinarily does, by a private and separate place where the staff, and the staff only, are allowed to go." I have quoted these passages for the purpose of shewing that neither the Master of the Rolls nor Farwell L.J. said anything in their judgments that would lead one to suppose that the only duty which

can be recognized for the purpose of dealing with the application of the Act of 1907, and especially of ss. 8 and 9, is a statutory duty. In my opinion, it is very difficult to say that there was a statutory duty imposed upon the railway company in respect of the provision of sanitary conveniences for the staff and porters. I propose to give my judgment on the basis that there has been no decision that, in order to come within the principle of the decision in that case, it is necessary that there should be a precise statutory duty to provide the sanitary convenience which is in question.

When one comes to deal with the question of statutory duty in this case, one finds that, by s. 38, sub-s. 1, of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), with regard to factories generally there is an express obligation to provide sufficient and suitable accommodation for those employed therein in the way of sanitary conveniences. But it is said that that does not help the defendants here, because, when the definition of "sanitary convenience" in s. 141 of the Act is looked at, it is only stated to include "urinals, water closets, earth closets, privies, and any similar conveniences," and that appliances for the cleansing and washing of hands are not sanitary conveniences in a factory. I am surprised to hear such a thing. I do not know whether the word "sanitary" has lost its derivative meaning altogether; but I should have thought that cleanliness had a good deal to do with sanitation in a factory. That is not the only legislation on the subject. When one looks at the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), one finds a long list of the kinds of factories in respect of which there are very wide provisions in the Act as to the duties incumbent upon the owners. I need not go through them at length, but a reference to them will be found in Redgrave's Factory Acts, 11th ed., p. 20. I may, however, mention that by s. 9, sub-s. 1, of the Act, "every factory and workshop must be provided with sufficient and suitable accommodation in the way of sanitary conveniences," and by sub-s. 2 the Secretary of State may make a special order, if he thinks fit, when he is of opinion that there is not sufficient and suitable accommodation in a factory within the meaning of the section. One has only to think of one's own practical

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experience of what one sees in London, in order to see the sanitary importance of cleanliness in factories in many cases. There are parts of the United Kingdom where a great deal of butter is produced, and where those engaged in its production do not approve of the employment of machinery, and consequently the whole process is carried on by hand. I should suppose that it is desirable from a sanitary point of view that the hands of those employed in that industry should be clean. Similarly, I should think that it is desirable that the hands of those employed in a baker's business should be clean. There are many other instances which might be mentioned of businesses in which the personal cleanliness of the employees is important. I mention these things because, though I do not suppose that any one could seriously suggest that owners of houses of business ought not for sanitary reasons to provide water closets for their workpeople, yet it is said that it would be going too far to say that they ought to provide lavatories and basins for the washing of their workpeople's hands, and for that reason we ought to arrive at the conclusion contended for by the plaintiffs in the present case. Speaking for myself, I think that there is a manifest duty on the part of the owner of a factory or house of business to provide reasonable sanitary accommodation for his workpeople, and that such accommodation extends to provision for cleanliness and such facilities as would enable them to wash their hands, when requisite, during the number of hours that they have to work in the factory or house of business.

Having said this much, I will proceed to deal with the construction of the Act. The question as to that divides itself into two heads. The first is as to the mere construction of ss. 8 and 9, which must of course be the same as was adopted by the Court of Appeal in *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1); and the second is whether, assuming the construction contended for by the Board to be correct, there is not something in this case, as there was in the case of *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1), to prevent its application, even though the

(1) [1910] 2 K. B. 890.

sections are to be construed as the Board contends. In that case the application of that construction was prevented because it was held that the water there supplied was supplied, not for domestic, but for railway purposes. I propose to consider whether, on the true construction of the Act, it may not similarly be said here that the water supplied in this case must be deemed to have been supplied, not for domestic, but for trade purposes.

I will now deal with the material sections of the Act. I need say no more with regard to s. 7 than that it provides for the laying of service mains or pipes for the supply of water for domestic purposes to places within the limits of supply upon such a requisition by owners or occupiers of houses or buildings as is mentioned in the section. Sect. 8 deals with the obligation of the Board to supply water by means of communication pipes to particular owners and occupiers. It is to be observed that, whereas the expression used in similar sections in former Acts was "dwelling-house" or some such term, it is in this section "any house or building or part of a house or building occupied as a separate tenement." The obligation is, upon the owner's or occupier's request, to furnish to such owner or occupier by means of a communication pipe or communication pipes and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost a sufficient supply of water for "domestic purposes." That supply is to be at a rate per annum which shall not exceed 5 per cent. of the rateable value of the house or building or part of a house or building in respect of which the supply is required. It is further provided that "such rate shall subject to the provisions of the Act be charged uniformly under like circumstances to all consumers entitled to such supply." As I understand, the meaning is that the rate must not exceed 5 per cent; it may be a less rate, but that rate cannot be charged as to some tenements only: it must be charged as to all tenements. Then comes s. 9, which provides as follows: [The Lord Justice then read the section.] Now I am told that, unless I read that section as extending to every supply of such water to a factory, especially a factory occupied solely for the purposes of any trade or business, I shall be giving no meaning to it. I cannot agree. I can well conceive that there

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may be water supplied to a factory which can in no sense be said to be supplied to it for trade or business purposes, but which is supplied to it for domestic purposes in a wide sense of the term. Let me mention possible instances of such a supply. One knows, and one is glad to know, that in modern times in factories and large houses of business it is often the practice of employers to supply their workpeople with conveniences which have really no relation to the actual manufacture or business carried on there. In some large factories and houses of business there are kitchens, and sometimes actually baths are provided, for the convenience of the workpeople. I can conceive of a variety of conveniences for domestic purposes, which might be supplied for workpeople in factories, and which could not in any sense be said to be supplied for purposes other than domestic purposes. Trade and business purposes are of course only instances coming under the head of purposes "other than domestic purposes" within the meaning of these Acts of Parliament. The cases which I have mentioned are cases, I think, of water supplied to houses or buildings occupied solely for purposes of trade or business, but which is nevertheless not water supplied for other than domestic purposes—which is water supplied not for trade purposes, but for domestic purposes. I can well understand that in practice there is great need for such a provision as that of s. 9 to meet such cases. If the law were that, whenever water was supplied to factories or business premises, it was not to be paid for as supplied for domestic purposes, the result would be that a great deal of water might be supplied which was not wanted really for trade or business purposes at all, but was wanted merely for such conveniences for the workpeople employed there as I have described. It was no doubt thought by the Legislature that in such cases that water ought to be paid for as supplied for domestic purposes. One can imagine that, in many factories, it might be found desirable to have a resident caretaker or caretakers, a man and possibly his wife, or men and their wives, and he or they would require water for domestic purposes. It would be manifestly wrong that water so supplied to them should not be paid for as supplied for domestic purposes. I mention these things to shew that, without doing violence to the language of the Act, a reasonable construction

can be given to the words of s. 9 without adopting the construction contended for by the Board. One objection which was urged against the latter construction was that it admittedly involved the possible hardship of really having to pay for the water so supplied twice over. It was argued in answer that the Board were a reasonable body, and would never insist upon that; and further that that hardship was met by the giving of an equivalent in the shape of the rebate provided for by s. 9. I do not say that there is nothing in that argument, but I do say that it does not afford a sufficient reason, in the case of language capable of two constructions, one of which will involve no hardship, and no departure from the line adopted throughout previous Water Acts from 1847 downwards, for adopting the other construction, which will involve hardship and a great departure from previous legislation on the subject, which is still to a large extent in force. I have said all that I need say as to the construction of s. 9. I think, as I have already said, that, without doing any violence to the language used, and satisfying every word of it, it is capable of the construction put upon it by Phillimore J.

I will now deal with the further question, namely, whether, assuming that the Board's construction of the sections is right, this case does not come within the principle on which *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1) was decided. I have already said that in my opinion the principle there laid down does not depend upon the existence of a statutory duty. The principle appears to me to be that, if there was a duty on the part of the occupier of the house or building for trade purposes, which resulted in the creation of these sanitary conveniences, that is sufficient to take the water supplied out of the category of water supplied for domestic purposes and to put it into the category of water supplied for purposes other than domestic. I have already read passages from the judgments of Cozens-Hardy M.R. and Farwell L.J. on this point, and in his judgment Kennedy L.J. says (2): "Speaking for myself I am not prepared to say that the railway purposes in reference to this section are confined absolutely to the things which the Railway Commissioners could compel the railway company to

(1) [1910] 2 K. B. 890. (2) [1910] 2 K. B. 901.

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provide." That seems to shew that he did not think that the principle of the decision was confined to statutory obligations. Sect. 25 of the Metropolitan Water Board (Charges) Act, 1907, provides as follows: "In and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include water closets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons, but shall not include a supply of water for any of the following purposes"—I am assuming that the supply in this case is prima facie for domestic purposes. That was what the Court assumed in *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1) But they said that the water supplied there must not be treated as supplied for domestic purposes, although the purposes for which it was supplied would prima facie come within the expression "domestic purposes" in the first part of s. 25, which I have read, the reason being that the section goes on to specify among other purposes not to be included in the expression "domestic purposes" "railway purposes." They said that, though the supply was for "domestic purposes," if nothing but the meaning of that expression taken by itself were to be considered, it was taken out of the category of a supply for domestic purposes when it was found to be for railway purposes. —The section goes on to specify as purposes excepted from "domestic purposes," among other things, "cleansing sewers and drains; cleansing and watering streets or roads; fire extinction; flushing drains by means of any apparatus discharging automatically; public pumps baths or washhouses; any trade manufacture or business . . . ." Those are words which, like "railway purposes" in the earlier part of the section, take out of the meaning of the expression "domestic purposes" things which but for them would be within it. In my judgment the result is that, if the water supplied for sanitary or lavatory purposes is only supplied because it is necessary, if the particular trade, manufacture, or business is to be decently conducted by the people employed, that there should be such conveniences on the premises, whatever they may be, then such a supply for the

(1) [1910] 2 K. B. 890.

purposes of health and cleanliness—I may say the cleanliness which is essential to the health and decency of the workpeople employed—ought not to be paid for as being for domestic purposes any more than the supply for the conveniences for the staff and porters in *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1) I treat that case as having decided this point. It was, I think, raised in the case, and the Court were bound, as it seems to me, to decide it. Under those circumstances, I think that, whatever construction is put upon s. 9, the water in this case ought to be treated as supplied for trade and not domestic purposes.

I do not think it very material to speculate why the word "manufacture" is used in s. 25 in dealing with the question as to what is included in the expression "domestic purposes," and not in s. 9, which only refers to "any trade or business." I do not suppose that it could be said that a factory does not come within the meaning of the word "business." I am afraid that my judgment has been rather long, but I thought the case one of importance, and was anxious to express my view fully, as I should shrink from giving any decision which might appear to question in any way the obligation of employers of labour to provide for their workpeople in their houses of business, of whatever kind, those conveniences which are essential for health, cleanliness, and decency. I am of opinion that this appeal should be dismissed.

FARWELL L.J. At whichever conclusion I arrive in this case, I have at least the satisfaction of knowing that it has judicial authority in its favour. If I follow that arrived at by Vaughan Williams L.J., I have the support of his great authority and that of Phillimore J. : and, if I arrive at the opposite conclusion, I have the support of Neville J. in *South Suburban Gas Co.* v. *Metropolitan Water Board* (2) and of Lord Coleridge J. I have, independently, formed the opinion which I will now express as briefly as I can.

The Act of 1907, though to some extent a new departure, does not proceed by way of making a clean sweep of all the previous

(1) [1910] 2 K. B. 890. (2) [1909] 2 Ch. 666.

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legislation, but of building on the old foundations with certain modifications. From the very commencement of the legislation on the subject in 1847, the basis of payment for water supply has been rateable value of the premises. Sect. 68 of the Act of 1847 provides that "the water rates, except as hereinafter and in the special Act mentioned, shall be paid by and recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water." That being the basis of payment, we find that the old Acts, most of which were private Acts, deal only with a supply of water for "domestic purposes." Those words have from time to time received judicial interpretation. The decisions as to their meaning were in great measure founded on the consideration that, under the Acts as they then stood, the owners of premises could require a supply of water only for domestic purposes, and not for trade purposes. The Courts therefore, having that in view, took a broad view of the meaning of the words "domestic purposes." The Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 12, expressly provides that a supply of water for domestic purposes shall not include a supply of water for any trade, manufacture, or business. No mention is made in any of the Acts before 1907 of "railway purposes" as distinct and separate from "trade or business purposes." A railway is of course a business or trade; and, if one finds in an Act that "railway purposes" are specially mentioned and treated separately from trade or business purposes, one can only conclude that, in the Act which so distinguishes them, the Legislature intended them to be treated as being distinct from those purposes.

Bearing in mind that the basis of the charge for water supplied under the old Acts was rateable value, I turn to the Act of 1907 to see what it has provided. In the first place uniformity in the rate of payment is desired. That appears from the preamble to the Act, which states that it is expedient to provide for uniform scales of charges throughout the limits of supply. Accordingly the last words of s. 8 provide that the supply of water for domestic purposes shall be at a rate per annum which shall not exceed 5 per cent. of the rateable value of the house or building

supplied, and that "such rate shall, subject to the provisions of this Act, be charged uniformly under like circumstances to all consumers entitled to such supply." That is one alteration introduced by the Act. Then comes another very considerable alteration, namely, that, subject to the paramount right of persons who require water for domestic purposes, persons who desire to be supplied with water, not only for trade purposes, but, as I shall presently shew, for railway purposes also, shall also be entitled to such a supply by means of communication pipes and apparatus to be provided by them, subject to the qualification provided for by s. 32 that, if there be a deficiency, domestic purposes are to have priority. The general scheme of the Act is much the same as that of the old Acts. By s. 8 any owner or occupier of a house or building, or part of a house or building occupied as a separate tenement, in any street within the limits of supply in which any service main or pipe of the Board is laid, may make a requisition for a supply of water for domestic purposes. It is to be observed that the tenement in respect of which the supply may be required is not specified: all that the owner or occupier has to do, if he requires a supply of water for domestic purposes, is to give notice to the Board of that requirement under s. 8. If he requires a supply of water for other than domestic purposes, he must make a requisition under s. 16, in which the phraseology is altered from "owner or occupier of any house or building" to "owner or occupier of any premises." The reason for this alteration is made obvious by one of the provisoes to the section, which mentions "railway purposes" and railway premises.

There are three cases in which the owner or occupier of premises may make his request to the Board for a supply of water for domestic purposes under s. 8. One is where the supply is required for domestic purposes pure and simple in a dwelling-house; another is where the supply is required for a house or building occupied solely for the purposes of any trade or business, or any profession or calling by which the occupier seeks a livelihood exclusively, and not for domestic purposes; a third is where the house or building is occupied, and a supply is required, both for trade or business or professional purposes and

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for domestic purposes. All these three cases are dealt with specifically by the Act. Sect. 8 deals with the case of water supplied for purposes solely domestic. Sect. 9 provides for cases where water is supplied for domestic purposes to a house or building occupied solely for trade or business or professional purposes. There is no question there of any mixing up of trade or business purposes and domestic purposes. The section assumes that a supply of water for domestic purposes may be required for a house or building occupied solely for trade or business or professional purposes. Sect. 20 provides that the Board shall not be bound to supply water otherwise than by measure to any house or building whereof any part is used for any trade or manufacturing purpose. That is the third case which I have mentioned. There may be a house used partly for a dwelling and partly for trade purposes. In that case the Board are not bound to supply otherwise than by measure, but the Act provides that they are not to have less than the amount which they would get if they charged upon the rateable value of the house. The original basis of charge for water supplied for domestic purposes, namely, by percentage on the rateable value, is preserved throughout the Act, and wherever the supply is for domestic purposes that is to be the rate charged. I cannot myself see how any meaning can be given to ss. 9 and 10 of the Act, if it can be said that water used for domestic purposes is also water used for trade purposes. If it were not for those sections, I should have been glad, having regard to the general purview of the Act, to agree with Vaughan Williams L.J. I think that the view taken by him would afford a reasonable test for determining the question whether a supply of water in a case like this should be charged for by meter, as being for trade purposes, or upon rateable value, as being for domestic purposes. But I do not think that this is in accordance with the words of the Act. I agree with what Vaughan Williams L.J. has said about sanitary conveniences. I do not doubt that all the conveniences provided in this case are conveniences such as are referred to in the Public Health (London) Act, 1891, and the Factory and Workshop Act, 1901. But unfortunately that consideration does not, in my opinion, determine the case in favour of the defendants. I should have been glad

if it had, because I think that in a factory such as that in question, even apart from statutory requirements, such conveniences are really necessary for keeping the workpeople employed in a healthy and fit condition. But s. 9 appears to me expressly to contemplate that premises used solely for trade or business purposes may be supplied with water for domestic purposes; and I can find nothing in the Act which enables me to say that, though the purposes in question are domestic purposes, still, inasmuch as they are also purposes required for the healthy occupation of the premises as trade premises, they are no longer domestic purposes, within the meaning of the Act, but are trade purposes. The view which I am taking is to my mind strengthened by the provisions of s. 20, which shews that the distinction between the two sets of purposes is kept quite clear, so that the Board are entitled to charge both meter rent for the water used in that way and also the rate payable on the rateable value under the earlier sections. It follows that, although the particular appliances in this case may be said to be essential for the purposes of the manufacturing or trade premises, and although they may not only be so essential but may also be required by statute, still the Act in terms which are clear has treated them as separate from matters required for trade or business purposes, and contemplates that water may be supplied for the two distinct sets of purposes, namely, trade purposes and domestic purposes, on premises occupied solely for trade or business purposes.

Then it is said that we are bound by the decision in the case of *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1) To my mind there is a marked distinction between that case and the present. So far as I am concerned, my judgment in that case depended upon the distinction drawn by the Act between trade or business purposes and railway purposes. As I have already pointed out, there is no mention in the earlier Acts of railway purposes as distinct from trade purposes. If they come in, it is under the head of trade purposes. In this Act of 1907 for the first time railway purposes are treated on a separate basis, and distinguished

(1) [1910] 2 K. B. 890, 900.

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from trade purposes, for reasons which are fairly obvious. I refer on this point to what I said in the case of *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1): "I then come to the question, what is the meaning of 'railway purposes' in this Metropolitan Water Board Act? In my opinion, it includes all those things which the railway company can be compelled by Act of Parliament to provide for the purpose of working the line efficiently. It is noticeable that the Act does still preserve the distinction between domestic purposes and trade purposes which may be found in the same building, as is shewn by s. 9. It is plain that a place used for trade purposes, and trade purposes only, is contemplated as a place in which water may possibly be required for use for domestic purposes. But it is curious that the Act, while so providing for trade purposes, says not a word about 'railway purposes.' In my view, the intention was that railway companies should stand on a different footing altogether, and that they are to be treated as separate entities. For this purpose, what we have to consider is what is a railway purpose; and, having once arrived at the conclusion which I have already stated that a railway purpose includes all that a railway company can be compelled to supply, it excludes any question of domesticity." Whether that view was right or wrong, it appears to me impossible to cite it as an authority in favour of the contention for the defendants in this case. I endeavoured in that case to express my view that the Act made a distinction between railway and trade purposes, which enabled us to say that railway purposes stood by themselves, and that everything that was requisite for the efficient working of the railway was not a domestic but a statutory purpose, a railway purpose made so by statute, and that, when in s. 9 the Legislature treated trade purposes and domestic purposes as co-existing in the same building, they refrained from doing so with regard to railway purposes and domestic purposes, with the intention, as I inferred, and I hope rightly, that railway purposes and trade purposes should stand on a different footing.

It may be that this view may press hardly upon the consumers

(1) [1910] 2 K. B. 890, 900.

of water in such cases as the present, but it is not for me to criticize the enactments of the Legislature. When once it is conceded that the Board are entitled in such a case to charge on rateable value in respect of water used for domestic purposes, and, in addition to that, to charge for water used for trade purposes, although the amount used for domestic purposes may be exceedingly small, and that used for trade purposes may be very large, it seems to me that any question of theoretical equality or fairness disappears. The only uniformity required by the Act is that expressed, and no other uniformity is mentioned at all. It is left to the sense of justice of the Board, a public body, to make the charges reasonably fair. The very exception, the rebate given in s. 9, shews this, because, to take a case, that was put by way of illustration, of a man with premises rated at 1500*l.* or 1600*l.* in the City, the rebate given to him may be small and out of all proportion to the real excess that he pays for water over a man whose premises are rated say at 1000*l.* a year. I confess that, so far as equality as between the payers of water rate is concerned, I see no trace of any attempt to enforce it, except the very rough and ready attempt in s. 9, which does not approach theoretical justice at all. But, however that may be, I am unable, on the true construction of this Act, to say first of all that these three matters, the lavatories, the urinals, and the water closets, are not all within the meaning of the old authorities, which, I think, apply to this Act, domestic purposes. I think that the old test remains applicable, namely, that the use to which the water is put, not the nature of the premises, must be considered. That is made perfectly clear by s. 9. There is no doubt that these are domestic purposes; and no doubt that they are used in a building occupied solely for trade or business purposes and not charged with inhabited house duty. In fact, if I desired to find a case for the purpose of illustrating the state of things contemplated by s. 9, I could not find a better one than the present. The result is that in my opinion the conclusion arrived at by Lord Coleridge J. was right, and with great respect I am unable to agree with that arrived at by my brother Vaughan Williams L.J., though I agree with much that

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he said in his judgment. In my opinion this appeal should be allowed.

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KENNEDY L.J. I have come to the conclusion that this appeal ought to be allowed. I think there are some things in this case which are fairly clear. One is that, according to the views of judges now extending over many years, certainly over nine years, the question whether purposes are or are not "domestic purposes" is to be decided, as I think the language of the Act also indicates in the sections to which Farwell L.J. has referred, by reference to the purposes in themselves, and not by reference either to the character of the premises where the water is used, or that of the persons using it. Essentially, you have got to find out what a domestic purpose is by the nature of the user. That has been pointed out by a number of judges from time to time, and notably, I think, by Channell J., Buckley L.J., and Eve J., before this case: and in the case of *Pidgeon* v. *Great Yarmouth Waterworks Co.* (1), in which the judgment of Channell J. has been referred to, he contrasts domestic purposes with purposes of a trade, manufacture, or business. He there said that "the words 'a supply of water for any trade, manufacture, or business' mean some more direct use of the water in that business than the mere use of it for domestic purposes by the inmates of the house." It is quite true that, in reading these earlier cases, one must bear in mind that they arose under Acts of Parliament which, though having the same purview in the sense of being Acts connected with the supply of water, are not the same Act as that with which we are dealing; and it is true, I believe, that, so far as the important question of railways is concerned, there is no mention of railways, for example, in the 12th section of the Waterworks Clauses Act of 1863, which corresponds otherwise, to a large extent, with s. 25 of the present Act. But those cases cannot, it appears to me, be distinguished, as regards their ratio decidendi, on the ground that they were decided in reference to different Acts of Parliament, because the matter which was in view in each case was the nature and extent of the distinction between domestic purposes and purposes of

(1) [1902] 1 K. B. 310, 315.

some business or manufacture. I do not think myself that it can successfully be contended that the water supplied for these conveniences in this case is not water supplied for what in the common understanding of men using the English tongue would be a "domestic purpose." The view which was, as I have said, stated by Channell J. in *Pidgeon* v. *Great Yarmouth Waterworks Co.* (1) has been supported as regards the present Act by the judgment of Neville J. in *South Suburban Gas Co.* v. *Metropolitan Water Board* (2), and expressed by him in these words: "It seems to me that those decisions shew that the inquiry is, not whether the premises are used for business purposes, but whether the water is used for business purposes or for domestic purposes, and that the uses in the present case are domestic.' Then he refers to s. 9. "The conclusion that such is the true construction to be placed upon s. 16 with reference to s. 25 is, I think, very much assisted by the provisions of s. 9, which provides for a rebate upon the water rate in cases where a house or building or part of a house or building is occupied solely for the purposes of trade or business, or any profession or calling by which the occupier seeks a livelihood."

Before proceeding to deal with the Act now in question, I wish to make this observation. Speaking for myself, I think that one should refrain from judging as to the true meaning of an Act of Parliament by speculating nicely upon the results to which one's interpretation of it may lead, subject of course to this, that it must be an intelligible and reasonable result which is arrived at by the construction one pronounces to be correct. There may be many different views, if one once gets on to the unsafe ground of conjecture as to results, and the same case may be looked at by different persons from a different point of view. Merely looking at the terms of this Act itself, I think that, with regard to the question which construction of it would be most conducive to the provision of these conveniences, if it be necessary to consider that, it is important to remember that the scheme of the Act is to give a right to a supply of water for domestic purposes, whereas there is no such absolute right where the supply of water is required for trade or manufacturing

(1) [1902] 1 K. B. 310, 315. (2) [1909] 2 Ch. 666, 674.

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purposes. In this very case, supposing that the owners of this factory could only require the supply of this water for manufacturing purposes, the Board under certain conditions would be justified by this Act in refusing to supply the water, whereas, if, being anxious to secure good sanitary conditions for their workpeople, the owners could require such a supply for the conveniences in question as being for domestic purposes, the Board would be compelled to supply that water. So that while in the one case the workman might be left without water, in the case of a domestic supply, he is entitled on the application of the occupier or owner to have it. That is an actual case, just to take an illustration. It is expressly provided in the Act, as I think it was in some, at any rate, of the previous Water Acts, by s. 32, "Notwithstanding anything in this Act or any agreement made thereunder the Board shall not be required to afford a supply of water for other than domestic purposes if and so long as any such supply would interfere with the sufficiency of the water required to be supplied for domestic purposes." So that, in a sense, if one were to speculate as to what would be best (which I absolutely decline to do), it might well be argued that it is in the interest of sanitary conditions for the workmen that the supply in the factory should come under the denomination of domestic purposes.

In the present case I base my decision, as Vaughan Williams L.J. intimated in his judgment, upon s. 9. I agree that, as was put in argument by Mr. McCurdy, there might be such a disproportion between the strictly domestic use of one sanitary appliance in a large factory and the rateable value of the factory, that there may be a possibility in a particular case of there being what at any rate the person charged may consider a hardship imposed upon him. But we cannot run away from plain words by suggesting that in some cases there might be a hardship. There are very few things in the world which do not involve some hardship in special cases. But let us consider s. 9 for a moment. I asked for any other explanation of s. 9 than the one which, like Farwell L.J., I feel obliged by the force of words to adopt ; and I got, I have no doubt, the best explanation that could be offered when Mr. McCurdy argued that there is sufficient application of this section, sufficient

evidence of a purpose in it, if it is confined to cases in which the business or manufacture or work carried on at the places specified in that section is one which does not require water. I cannot read into a section of this kind the words which it would be necessary to insert if the section were to be so limited. It would then require to be read thus: "To any house or building or part of a house or building occupied solely for the purpose of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit—provided that water is not used in the trade, business, profession or calling." I cannot read it so. What possible right has one to limit the section in that way? Then another suggestion, by which it was also sought to give a meaning to this section without violating its language, is that there might be cases in which what I may call an elaborate system of sanitary conveniences and advantages requiring water is provided. It was suggested that there might be kitchens, or there might be sitting-rooms with water conveniences, that there might be in various ways elaborate domestic provisions made, and therefore that, although the occupier was only carrying on a business or trade or profession or calling in the house or building, there might be something so evidently domestic in the uses to which the water was put that you might apply the section to those cases. But there again, logically, how am I to draw the distinction between less or more? The use of the water is domestic or not domestic, not according to the elaborateness of the appliances, but according to the nature of its application; and I cannot but see that we should be involved in a difficult and, I should think, impracticable inquiry, certainly one which there is no countenance for in the terms of this section, if we were to hold that, if you give your workmen elaborate arrangements for their comfort involving the use of water, then you will come within the section, and if you provide them only with a water closet you will not. Why? Because one is more elaborate than the other. I cannot follow that reasoning, nor can I imagine that the Legislature intended any such thing. While it is excellent to find such arrangements provided for workmen, and everybody hopes that they will be provided wherever possible, and that the lives of those who

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work in these places will be made more comfortable and cleanly, yet I do not see that the supply of water is made more or less a domestic purpose where it is for the comfort of the workmen, or how a domestic convenience involving the supply of water can be treated in one way for the purposes of s. 9 if it is simple, but is not to be so treated if it is elaborate. I cannot see that the measure of degree is the test of the application of the section.

I am not going, after what has been said, to read s. 9 over again. It contemplates that there may be cases of what I may call variable merit in respect of the exemption of the rebate, because the rebate is not a fixed rebate for every case, but there is a margin of from 20 to 30 per cent. That may fairly be read as intended to cover the difference in degree of the domestic supply which is actually given in particular cases, and therefore to take into consideration some of the matters which were put before us in argument as constituting a hardship, if the Board's construction of the Act were correct.

It is, however, said that there is in the judgment of the Court of which I was one of the members, in the *Brighton Railway Case* (1), something which makes for the respondents in the present case. I am still of opinion that it is not merely the question of legislative compulsion that is to be taken into consideration. In that case we decided, as the county court judge and, I think, Phillimore J. also say in this case, strictly on the words "railway purposes." Whatever reason the Legislature had,—whether the peculiar restrictions imposed by statute upon railway undertakings was the cause or not,—for some reason in this Act "railway purposes" are distinguished from trade, manufacture, and business, and I think that it was that distinction, whatever may be the shades of difference in the reasoning of the different members of the Court, which produced the decision. It does not seem to me that one ought to neglect a distinction prominently made by the Legislature itself in separating "railway purposes" from "trade, manufacture, or business," and one must suppose there was some meaning in so distinguishing "railway purposes." The word "purposes," as has been pointed out, appears in the section with regard to all the

(1) [1910] 2 K. B. 890.

provisions, but "railway purposes" are distinguished, and "railway" does not appear in s. 9. We had there to deal with the application of s. 25 in the case of a railway. I do not see myself, unless all the stress is laid upon the fact of legal compulsion, that that decision in any way affects our decision in the present case. For my own part I base my decision in the present case upon the words "domestic purposes," which the purposes for which the water is used, in my opinion, alike according to the natural meaning of "domestic" and according to judicial authority, unquestionably are, and upon the provisions of s. 9, and I do not think that that decision in any way therefore controls my decision in the present case.

I just wish to add that I do not think that, because "manufacture" is left out of s. 9, any inference in favour of the contention for the defendants can be drawn. I do not think that this Act is as clear as one might wish that it had been; but it is rather noticeable that the Legislature do not seem to have regarded "manufacture" always as a word that was to be used. They do not use the same words in the different sections. "Trade, business, profession or calling" you have in s. 9. Then, when you get to s. 20, you get "trade or manufacture," which I suppose is not intended to distinguish in s. 20 from the fuller description in s. 9, and then, when you get to s. 25, you get again "trade, manufacture, or business." I do not think that one can draw safely from the language of this statute any inference as to the intention to exclude "manufacture" from s. 9, because that word is not used, seeing that the words "trade or business" clearly include "manufacture." In my opinion, therefore, construing "domestic purposes" as I do, and holding that these things are in themselves a domestic purpose, I do not think that they can, for the purposes of this case, falling as they do exactly within the description of s. 9, be excluded from the operation of the statute in the way for which the present respondents contend, and I therefore agree that this appeal should be allowed.

*Appeal allowed.*

Solicitor for plaintiffs: *Walter Moon.*

Solicitors for defendants: *H. H. Wells & Sons.*

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NOTE.

Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.):

Preamble states (inter alia) that it is provided by the Metropolis Water Act, 1902, "that the Board shall within three years after the appointed day referred to in that Act . . . . introduce into Parliament a bill providing for uniform scales of charges applicable throughout their limits of supply," and "that it is expedient to provide for such uniform scales of charges . . . ."

Sect. 7: "Subject to the provisions of this Act the Board shall cause service mains or pipes (not being communication pipes) to be laid down and a supply of pure and wholesome water for domestic purposes to be brought to every part within the limits of supply whereunto they shall be required by so many owners or occupiers of houses or buildings or parts of houses or buildings occupied as separate tenements in that part of the limits that the aggregate amount of water rate payable by them annually under this Act in respect of the supply so required shall be not less than one tenth part of the expense of providing and laying down such mains or pipes, Provided that no such requisition shall be binding on the Board unless the owners or occupiers shall severally execute an agreement binding themselves to take such supply of water for three successive years at least."

Sect. 8: "Subject to the provisions of this Act the Board shall at the request of the owner or occupier of any house or building or part of a house or building occupied as a separate tenement in any street within the limits of supply in which any service main or service pipe of the Board shall be laid or of any person who under the provisions of this Act shall be entitled to require a supply of water for domestic purposes furnish to such owner or occupier or other person by means of a communication pipe or communication pipes and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost a sufficient supply of water for domestic purposes at a rate per annum which shall not exceed five per centum of the rateable value of the house or building or part of a house or building in respect of which the supply is required and such rate shall subject to the provisions of this Act be charged uniformly under like circumstances to all consumers entitled to such supply."

Sect. 9: "Where under the foregoing provisions of this Act the Board furnish a supply of water for domestic purposes to any house or building or part of a house or building occupied solely for the purposes of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit and occupied as a separate tenement which is assessed to the poor rate or other rate in which such last mentioned rate is included in a sum exceeding three hundred pounds per annum and is not charged with the payment of inhabited house duty the Board shall make or allow from the water rate payable in respect of such supply a rebate or discount of such amount (not being less than twenty per centum or more than thirty per centum of such water rate) as the Board may from time to time determine and such rebate or discount shall from time to time be made or allowed from the water rate payable in respect of every such supply as aforesaid and at a uniform rate per centum: provided that in making or allowing such rebate or discount the water rate shall not in any case be less than would have been payable in respect of any house or building or part of a house or building

occupied as a separate tenement assessed to the poor rate or other such rate as aforesaid in a sum of three hundred pounds per annum."

Sect. 16: "(1.) The Board shall at the request of any owner or occupier of any premises situate in or adjoining any street in which any main or service pipe of the Board is or shall be laid who requires for use on such premises a supply of water by measure for purposes other than domestic and by means of communication pipes and other necessary and proper apparatus to be provided laid and maintained by and at the cost of the person requiring such supply afford a supply of water by means of a meter or other fit and sufficient instrument or apparatus supplied (at the cost of such person as aforesaid) or approved by the Board for measuring and ascertaining the quantity of water so supplied. (2.) The Board shall charge for any supply furnished by them under the last preceding sub-section of this section not exceeding the following rates for every one thousand gallons (that is to say" [The section then specified rates per 1000 gallons, which were proportionately less as the total number of thousands of gallons taken increased.]

A proviso to the section was as follows: "Provided further that the whole of the water taken within any railway premises which form one area for railway purposes and are connected otherwise than by the running lines of the railway company shall be reckoned as one supply and chargeable accordingly notwithstanding that the water may in fact be delivered thereat through two or more meters pipes or other necessary and proper instruments."

Sect. 20: "The Board shall not be bound to afford a supply of water otherwise than by measure to any house or building whereof any part is used for any trade or manufacturing purpose for which water is used or to any common lodging-house barracks workhouse or other public institution or building: provided that where the Board decline to afford otherwise than by measure any such supply as aforesaid they shall if required by the person who but for the provisions of this section would have been entitled to demand such supply furnish to the building in respect of which the supply is required a sufficient supply of water upon and subject to the terms and conditions contained in the section of this Act relating to 'supply by measure' and subject to the next following proviso (that is to say) provided that . . . . the Board may require that the sum to be paid for any such supply by measure shall not be less than the sum which would have been chargeable in respect of such supply had the supply been given under the provisions of this Act which relate to the supply for domestic purposes otherwise than by measure and the charges therefor."

Sect. 25: "In and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include water closets . . . . but shall not include a supply of water for any of the following purposes (namely):— . . . . Steam gas motor and other like engines; railway purposes; ventilating purposes; working any machine or apparatus; . . . . cleansing sewers and drains; cleansing and watering streets or roads; fire extinction; flushing drains by means of any apparatus discharging automatically; public pumps baths or washhouses; any trade manufacture or business . . . ."

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*March 22.*

## METROPOLITAN WATER BOARD *v.* BIBBEY.

*Waterworks—Water Rate—Where Owner and not Occupier liable to Payment—Empty House—Right of Water Company to cut off Supply—Water Companies (Regulation of Powers) Act*, 1887 (50 & 51 *Vict. c.* 21), *s.* 4.

By s. 4 of the Water Companies (Regulation of Powers) Act, 1887, "Where the owner and not the occupier is liable by law . . . . to the payment of the water rate in respect of any dwelling-house . . . . no water company shall cut off the water supply for non-payment of the water rate":—

*Held*, that the words "is liable" refer to a liability at the date when the water rate became due, and that, provided that there was at that date an occupier other than the owner, and that the owner and not the occupier was liable for the payment of that rate, the section prohibits the water company from cutting off the supply for non-payment of the rate even after the occupier has given up possession and the premises have become vacant.

Case stated by a metropolitan police magistrate.

The appellants were summoned to answer two informations laid by the respondent for having unlawfully cut off the water supply at 44 and 46, Wilmer Gardens, Hoxton, for non-payment of the water rate contrary to the Water Companies (Regulation of Powers) Act, 1887, s. 4.

By s. 53 of the Waterworks Clauses Act, 1847, "Every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act shall when he has laid such communication pipes as aforesaid and paid or tendered the water rate payable in respect thereof according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

By s. 74, "If any person supplied with water by the undertakers or liable as herein or in the special Act provided to pay the water rate neglect to pay such water rate at any of the said times of payment thereof the undertakers may stop the water from flowing into the premises in respect of which such rate is payable by cutting off the pipe to such premises or by such means as the undertakers shall think fit."

By s. 4 of the Water Companies (Regulation of Powers) Act, 1887, "Where the owner and not the occupier is liable by law or by agreement with the water company to the payment of the water rate in respect of any dwelling-house or part of a dwelling-house occupied as a separate tenement no water company shall cut off the water supply for non-payment of the water rate, but such water rate, without prejudice to the other remedies of the company for enforcing payment thereof from such owner, shall, together with interest thereon at the rate of five pounds per centum per annum, computed from the expiration of one month from the time when the same has been claimed by the company until receipt thereof by the company, be a charge on such dwelling-house in priority to all other charges affecting the premises, and (without prejudice to such charge) the amount may be recovered with the costs incurred from the owner or from the occupier for the time being in the same manner as water rates may by law be recovered." By s. 5, in the event of any such supply being cut off in contravention of the Act the company cutting it off are to be liable to a penalty recoverable by "the person aggrieved."

By s. 26 of the Metropolitan Water Board (Charges) Act, 1907, "Where a house or building or part of a house or building supplied with water is let to monthly or weekly tenants or tenants holding for any other period less than a quarter of a year the owner instead of the occupier shall if the Board so determine pay the rate for the supply."

On November 6, 1908, the following resolution was passed by the appellants, acting under the last-mentioned section:—"Where a house or building or part of a house or building is let to a monthly or weekly tenant or to a tenant holding for any other period less than a quarter and the rent payable by the occupier includes the rate for the supply of water the Board do hereby determine that the owner instead of the occupier shall pay the said rate for the supply of water."

At the hearing the following facts were admitted or proved. The respondent was the freeholder of Nos. 44 and 46, Wilmer Gardens, Hoxton. In December, 1907, the premises had been leased by him for a term of seven years from that date to a Mr.

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Le Grand, who took over the respondent's business and traded as Bibbey & Co. The said Bibbey & Co. sub-let No. 46 to a Mrs. Grey at a rental of 13*s.* 6*d.* a week inclusive of rates and taxes, and No. 44 was occupied rent free and free of rates and taxes by a Mr. Fisher, their caretaker, who collected the rent of No. 46 and kept the same as and for his wages. Bibbey & Co. duly paid the water rates in respect of the premises until March, 1910. On the appellants' collector applying on or about July 1, 1910, to Bibbey & Co. for the water rate due in respect of the premises for the two quarters ending September 30, 1910, he failed to get the money. On August 19, the water rates being still unpaid, and the house No. 44 having been empty and unoccupied since August 14, and the house No. 46 having been empty and unoccupied since July 13, the appellants cut off the water supply to the said houses. Early in August, 1910, shortly before the water was cut off, the respondent accepted from Le Grand a surrender of the house and resumed possession of the premises. The premises, which during the lease to Le Grand had been let on weekly tenancies (the caretaker's occupation of No. 44 being equivalent to a weekly tenancy), were taken over by the respondent for the purpose of again letting them on weekly tenancies, and his object in insisting on having vacant possession of the same was to enable him to have the premises done up prior to reletting them.

It was contended on behalf of the appellants that no offence had been committed by them because the Act of 1887 only limits the powers of the water company to cut off the tenant's supply, and that in order to constitute an offence under that Act there must when the water is cut off be an actual tenant of the premises from which the water is cut off; and that, the premises being empty and unoccupied and the rates unpaid, the appellants were under no obligation to afford a supply of water thereto for domestic purposes.

On behalf of the respondent it was contended that the premises when they came into his possession were premises within the meaning and scope of the resolution above mentioned, and that he was the owner for the time being and liable to pay the water rate due from March to September, 1910, as soon as he became

such owner, and that the appellants were therefore bound to proceed against him under s. 4 of the Act of 1887 and were not entitled to cut off the water supply even though for the time being the premises were not actually in the occupation of any tenants.

The magistrate was of opinion that the respondent's contention was correct and convicted the appellants.

*Courthope Munroe*, for the appellants. The Act of 1887 has no application to empty houses, and here at the time when the water was cut off the houses were empty. The words of s. 4 "Where the owner and not the occupier is liable" can have no meaning except as applied to a case where there is a person in occupation of the house distinct from the owner. The Act was intended as a sanitary measure to protect tenants in actual occupation from having their water cut off because the rates were unpaid through no fault of their own. The owner can claim no right of supply to an empty house as such. If he could insist on the water being so supplied, the water company would have no protection against the pipes being damaged by frost and the water wasted.

[RIDLEY J. Does not the language of s. 26 of the Metropolitan Water Board (Charges) Act, 1907, "Where a house . . . . is let to monthly or weekly tenants" refer to the normal condition of the house, and mean "where a house is usually let to monthly or weekly tenants"? And if so, is not the owner of a house of that description continuously liable by law to the payment of the water rate within the meaning of s. 4 of the Act of 1887 irrespective of the question whether there are in fact any tenants in occupation at the time?]

No. When once the house was empty non constat that the owner would ever get any further tenants to hold on so short a tenancy.

*Giveen*, for the respondent. It must be conceded by the appellants that on July 2 they could not have cut off the water, although there were two quarters' water rates then due, because there were then tenants in occupation of both the houses. The charge upon the premises which was given by way of

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compensation for the loss of the right to cut off the supply thereupon at once attached. The words "where the owner and not the occupier is liable" do not mean "is liable at the time of the cutting off of the water," but "is liable at the date when the rate accrues due." If this were not so, upon the tenant going out of occupation the charge on the premises would cease, and that cannot have been the intention of the Act.

*Courthope Munroe* in reply.

LORD ALVERSTONE C.J. In this case I am of opinion that the magistrate has come to a right decision. The facts were these: Mr. Bibbey, the freeholder, had let the premises to a Mr. Le Grand for a term of seven years from December, 1904. Le Grand had sub-let them on weekly tenancies free of water rate. Under those circumstances the premises came within the terms of a resolution passed by the Water Board under the provisions of s. 26 of the Metropolitan Water Board (Charges) Act, 1907, whereby they resolved that where a house supplied with water was let to a weekly tenant and the rent payable by the tenant included the water rate the owner instead of the occupier should pay the water rate. Then early in August Le Grand surrendered his lease and went out of possession. At that time two quarters' water rates were due, and on August 19, as the rates were still unpaid, the appellants cut off the water. The question is whether in so doing they acted in contravention of the Act of 1887. That Act recites that it is expedient to make further provision with respect to the power of companies supplying water at a profit and in s. 4 contains this prohibition: "Where the owner and not the occupier is liable by law . . . . to the payment of the water rate in respect of any dwelling-house . . . . no water company shall cut off the water supply for non-payment of the water rate." It was contended that prohibition was designed only for the protection of a tenant whose landlord was liable to pay the water rate and had failed to do so, and had no application to a case where the owner was himself in occupation. No doubt prima facie that is so. But here at the dates when the two quarters' rates respectively became due, namely, on April 1 and July 1, and when, but for that Act, the appellants might have

cut off the supply under the provisions of s. 74 of the Waterworks Clauses Act, 1847, there were tenants in occupation of the premises, and as they were weekly tenants, and the owner was consequently liable under the resolution of the Board to pay the water rate, the prohibition applied, and it was not disputed that that prohibition continued to apply until Le Grand surrendered his lease and his tenants went out of occupation. But Mr. Courthope Munroe contended that as soon as the premises became vacant and there ceased to be any persons standing in the relation of tenants the right of the appellants to cut off the water revived. With that contention I cannot agree. If it were right they would lose the charge which the Act gives as compensation for the deprivation of the right to cut off the water. Section 4 goes on, "But such water rate, without prejudice to the other remedies of the company for enforcing payment thereof from such owner, shall . . . . be a charge on such dwelling-house," and that charge is, according to the decision in *East London Waterworks Co.* v. *Kellerman* (1), enforceable against the person who happens to be the owner for the time being. It is in my opinion impossible to say that the fact that at the time when the water was cut off there had ceased to be any tenants, and the owner was himself in occupation, can remove the prohibition upon the appellants against cutting off the water for non-payment of water rates which accrued due at a time when there were tenants. Then it was said that by s. 5 the penalty is given to the person aggrieved and that that person is the tenant, and that consequently if there is no tenant there is no person who can recover the penalty. It seems to me that, although prima facie the tenant would be the person aggrieved if his water were cut off because his landlord did not pay the rate, the landlord is equally aggrieved if by reason of the water being improperly cut off he is prevented from having his premises in a condition of readiness for letting. The appeal must be dismissed.

RIDLEY J. I am of the same opinion. It has been contended on behalf of the appellants that the provisions of s. 4 of the Act

(1) [1892] 2 Q. B. 72.

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of 1887 had no application to this case because at the time when the water was cut off the premises were vacant. I cannot agree with that argument. The section in terms applies wherever "the owner and not the occupier is liable . . . . to the payment of the water rate," and by the resolution of the Water Board the owner is so liable where the house "is let to monthly or weekly tenants." By that I think is meant that the owner is to be liable where the character of the house is such that it is in practice invariably let on monthly or weekly tenancies. The resolution is, I think, there referring to the description of the property. I cannot see how it can be contended that the character of the property is to be changed from time to time, and that the rights of the Water Board are to be altered from quarter to quarter according as there do or do not happen to be tenants in occupation of the premises at the time. Here it is found that during the currency of Le Grand's lease the premises were in fact let to weekly tenants, and that when he surrendered Mr. Bibbey resumed possession with the object of having them done up preparatory to reletting them on weekly tenancies. I cannot think that in the interval between the lettings the property lost its character of being "let to weekly tenants," and I am not prepared to accede to the argument that, because the words "where the owner and not the occupier is liable" are the introductory words of the section, therefore in order to allow of the section applying there must at the time when the supply is cut off be some person in occupation other than the owner.

CHANNELL J. I am of the same opinion. The only question before us is whether the Water Board have acted in contravention of s. 4 of the Act of 1887 in such a way as to incur the penalty imposed by s. 5. The main object with which that Act was passed was undoubtedly that of protecting tenants, but it also deals with the rights of the owners. The 4th section takes away the remedy which, but for that section, the Water Board would have of cutting off the supply for non-payment of the water rate. And the rates in respect of which it takes that remedy away are water rates for which the owner and not the occupier is liable. In this case the water rates in respect of

which the Water Board cut off the supply were clearly rates for which at the time when they became due the owner and not the occupier was liable. Therefore they were rates in respect of which the remedy of cutting off the supply was taken away, and the Water Board consequently acted in contravention of the section. I think Mr. Courthope Munroe was quite right in saying that the section assumes the existence both of an owner and of an occupier; but when you come to consider what effect is to be given to that, the material time clearly is the time at which the rate becomes due, because when the rate is due there are then certain remedies for it, including the charge upon the property. It cannot possibly be said that that charge is affected by the lessee surrendering his lease and the premises becoming vacant. Notwithstanding the surrender the charge continues to subsist, from which it follows that there can be no right to cut off the supply, the one remedy being given by the Act in substitution for the other.

*Appeal dismissed.*

Solicitor for appellants: *Walter Moon.*
Solicitor for respondent: *G. Kebbell.*

J. F. C.

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*March* 20.

## THE KING *v.* GOVERNOR OF BRIXTON PRISON.

*Extradition—Requisition for Surrender—Conditions of—Validity—Defect in Procedure.*

A warrant was issued by a French magistrate for the arrest of a person charged with an offence to which the extradition treaty between Great Britain and France applied. At the time of issuing that warrant no depositions relating to the charge had been taken on oath before the said magistrate. A requisition was made by the French Government to the British Secretary of State for the surrender of the accused person. By the terms of the treaty the requisition for the surrender of an accused person is to be "accompanied by a warrant of arrest or other equivalent judicial document issued by a judge or magistrate duly authorised to take cognizance of the acts charged against the accused in France together with duly authenticated depositions or statements taken on oath before such judge or magistrate." Upon receipt of an order from the Secretary of State in that behalf a police magistrate caused the accused person to be apprehended. The treaty provided that a fugitive criminal who had been so apprehended should be discharged "if within fourteen days a requisition shall not have been made for his surrender in the manner directed" by the treaty:—

*Held*, that it was not essential to the validity of the requisition or of the subsequent proceedings founded thereon that the procedure before the French magistrate should have been regular, and that the absence of sworn depositions taken before that magistrate did not entitle the accused person to be discharged.

Rule for a habeas corpus.

On February 6, 1911, a warrant was issued by a magistrate attached to the Court of first instance of the department of the Seine for the arrest of Ernest Edward Thompson on a charge of obtaining money by false pretences contrary to art. 405 of the French Penal Code. The offence of obtaining money by false pretences is one to which the extradition treaty between Great Britain and France, 1876, applies. At the time the magistrate issued the warrant no depositions relating to the charge had been taken on oath before him.

The offence of so obtaining the money was alleged to have been committed in a railway train in the course of a journey between Paris and Brussels, and as there was apparently some doubt on which side of the frontier the offence was committed, a

deposition alleging the facts of the offence was sworn before a commissary of police at Brussels on December 22, 1910; and though there was no evidence as to what materials the French magistrate had before him, presumably he had before him the deposition so taken in Brussels. A requisition for the surrender of Thompson was made by the diplomatic representative of the French Government to the Home Secretary, who on February 28 by order addressed to the chief magistrate at Bow Street signified that the requisition had been made and required the magistrate to issue a warrant for his apprehension. Thompson was arrested on March 2 and brought before the magistrate at Bow Street, who on March 15 issued his provisional warrant committing him to Brixton Prison to further answer the charge against him. A rule nisi having been obtained on March 16 for a writ of habeas corpus on the ground that the prisoner was entitled to be discharged from custody because no requisition had been made by the French Government in the manner directed by the treaty (1) within fourteen days of his arrest,

(1) By the extradition treaty between England and France dated 1876, art. 7, "In the case of a person accused the requisition for the surrender shall be made to Her Britannic Majesty's Principal Secretary of State for Foreign Affairs by the Ambassador or other Diplomatic Agent of the President of the French Republic accompanied by a warrant of arrest or other equivalent judicial document issued by a judge or magistrate duly authorised to take cognizance of the acts charged against the accused in France together with duly authenticated depositions or statements taken on oath before such judge or magistrate clearly setting forth the said acts and containing a description of the person claimed and any particulars that may serve to identify him. The said Secretary of State shall transmit such documents to Her Britannic Majesty's Principal Secretary of State for the Home Department, who shall then by order under his hand and seal signify to some police magistrate in London that such requisition has been made and require him, if there be due cause, to issue his warrant for the apprehension of the fugitive."

Art. 9: "A fugitive criminal may be apprehended under a warrant issued by any police magistrate, justice of the peace, or other competent authority in either country, on such information or complaint, and such evidence, or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed or the prisoner convicted in that part of the dominions of the two Contracting Parties in which the magistrate exercises jurisdiction . . . . He shall be discharged, as well in the United Kingdom as in France, if

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*Sir Rufus Isaacs, A.-G.*, and *Rowlatt* shewed cause. The only question is whether the magistrate had jurisdiction under the Extradition Acts. That the conditions of the treaty preliminary to the Secretary of State's order were not complied with did not affect that jurisdiction. It was a matter for the Secretary of State alone to consider. It was enough for the magistrate that he had received the order and had evidence before him which justified the issue of a warrant. In *In re Counhaye* (1) the extradition of the accused person was claimed by Belgium under a treaty containing an article in the same terms as art. 7 of the French treaty, and there, as here, none of the depositions accompanying the requisition had been taken before the Belgian magistrate who had issued the warrant. The Court there held the particular offence charged was not an offence within the Extradition Act, 1870, and on that ground discharged the prisoner, but with regard to an objection that the terms of the treaty as to the depositions had not been complied with, Blackburn J. said he did not think that that affected the magistrate's jurisdiction. Reliance will be placed by the other side on *Reg.* v. *Wilson* (2), where the Court refused to allow the surrender of a British subject to the Swiss Government on the ground that by the terms of the treaty with Switzerland the subjects of one of the contracting parties should not be surrendered to the other. But that went upon the ground that the offender there was a person to whom the Act did not apply; it did not involve, as the present case does, a mere question of procedure. The form of "Order of Secretary of State to the Police Magistrate" in Sched. II. to the Extradition Act, 1870, recites simply that a requisition has been made; it says nothing about compliance with the preliminaries mentioned in the treaty. It requires the magistrate to issue his warrant "provided that the conditions of the Extradition Act, 1870, relating to the issue of such warrant are in your judgment complied with," but it is subject to that

within fourteen days a requisition shall not have been made for his surrender by the Diplomatic Agent of his country in the manner directed by articles 2 and 4 of this treaty."

(1) (1873) L. R. 8 Q. B. 410.

(2) (1877) 3 Q. B. D. 42.

proviso alone. Moreover art. 9 gives the prisoner no right to be discharged here. It only applies to a case where the accused person has been apprehended before any requisition has been issued.

*Percival Clarke*, for the prisoner. The bargain between the two countries is that if the terms of the treaty are not complied with, and if a requisition has not been made "in the manner directed" by the treaty, the prisoner shall be discharged. The reference to "articles 2 and 4 of this treaty" has got into art. 9 by mistake. Arts. 2 and 4 have nothing to do with this subject, and the reference to them must be struck out as insensible. Art. 9 must be read as if the words were "in the manner directed by this treaty." That has reference to art. 7, which indicates what are the conditions of a valid requisition. It must be accompanied by a warrant and by depositions on oath taken before the magistrate who issued the warrant. Without such depositions the requisition is bad, and the requisition is the foundation of the magistrate's jurisdiction. *Reg.* v. *Wilson* (1) is inconsistent with the obiter dictum in *In re Counhaye* (2) and must be treated as overruling it. *Reg.* v. *Wilson* (1) shews that the Order in Council which embodies the treaty is to be read along with and as part of the Act so far as it is applied to the particular State. Therefore the conditions as to the requisition must be treated as if they were part of the Act. All the conditions of the treaty must be regarded as of equal importance. It is not open to the Court to treat certain of those conditions as relating only to procedure. To hold that it cannot go behind the order of the Secretary of State might conceivably lead to grave abuse.

RIDLEY J. I am of opinion that this rule should be discharged. It is a rule to shew cause why Ernest Edward Thompson should not be discharged from custody by virtue of art. 9 of the treaty with France, 1876, because no requisition has been made in the manner directed by the treaty within fourteen days of his arrest. The point taken on his behalf is that the requisition had not been made in accordance with art. 7, which provides that it shall be "accompanied by a warrant of arrest or other equivalent

(1) 3 Q. B. D. 42. (2) L. R. 8 Q. B. 410.

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judicial document issued by a judge or magistrate duly authorised to take cognizance of the acts charged against the accused in France, together with duly authenticated depositions or statements taken on oath before such judge or magistrate." The only deposition on oath that accompanied the requisition was a deposition taken, not before the judge or magistrate in France, but before a commissioner of police in Brussels. And it is accordingly contended that the requisition of the French Government and the order of the Home Secretary are defective, and that the magistrate had no jurisdiction to issue his warrant under the Extradition Act. Under those circumstances the question which we have to determine is whether we can go behind the Secretary of State's order and inquire into the materials upon which it was made. In the case of *In re Counhaye* (1) a similar question was raised upon an objection that none of the depositions accompanying the requisition were taken before the judge or magistrate who had issued the warrant for the prisoner's arrest. It became unnecessary to decide the point as the offence with which the prisoner was there charged was not an offence within the treaty then before the Court, and the prisoner was on that ground discharged from custody, but Blackburn J. expressed an opinion that the objection was ill founded. "As to the objection," he said, "that the terms of the treaty have not been complied with, and the order of the Secretary of State ought therefore not to have been made, I do not think that affects the magistrate's jurisdiction; if the conditions of the treaty have not been complied with the Secretary of State might have refused to order a magistrate to proceed; but these conditions are not in the Act of Parliament; and the Secretary of State having made an order, and the magistrate having acted under it, all we have to do is to look at the Act to see whether he had jurisdiction under it." Now that expression of opinion is directly in point here, and covers this case unless it is overruled, as Mr. Clarke has contended, by the decision in *Reg.* v. *Wilson*. (2) I do not think that it is overruled. The case of *Reg.* v. *Wilson* (2) appears to me to be an entirely different one. There the treaty, which was with Switzerland, expressly

(1) L. R. 8 Q. B. 410. (2) 3 Q. B. D. 42.

provided that no British subject should be surrendered to the Swiss Government, and on proof that the prisoner was a British subject the Court ordered him to be discharged from custody. But the Extradition Act by s. 2 only applies to any particular foreign State so far as the Order in Council, which embodies the terms of the treaty with that State, makes it apply; and consequently the prisoner there not being a person to whom the Act applied, the magistrate had no jurisdiction to issue a warrant for his arrest. Here, on the other hand, the prisoner is admittedly a person to whom the Act applies, and the offence with which he is charged is one within the Act, and the only objection to his being dealt with under the Act is that there has been an irregularity in the procedure preliminary to the making of the Secretary of State's order. That in my opinion is not enough to take away the magistrate's jurisdiction. In the exercise of his jurisdiction the magistrate has caused the prisoner to be arrested, upon evidence which in his opinion justified the issue of his warrant. And under s. 14, which provides that depositions taken in a foreign State may be received in evidence in proceedings under the Act, he was entitled to look at the depositions taken in Belgium none the less because the State demanding the prisoner's surrender was not Belgium but France.

DARLING J. In support of this rule Mr. Clarke relies upon art. 9 of the treaty, which provides that the prisoner shall be discharged unless within fourteen days of his arrest a requisition shall have been made for his surrender "in the manner directed by articles 2 and 4 of this treaty." Now arts. 2 and 4 have nothing to do with this matter and are obviously referred to by mistake; and I think we might decide this case upon the ground that no neglect to comply with any of the provisions of arts. 2 or 4 has been shewn. But suppose we look at art. 7, which we are told is the article really intended. That article provides that the requisition of the foreign Government shall be accompanied by depositions or statements taken on oath before the judge or magistrate who issued the warrant of arrest; and the complaint is that the depositions which in fact accompanied the requisition were not taken before that

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magistrate or indeed in France at all. Mr. Clarke has contended that the dictum of Blackburn J. in *In re Counhaye* (1) is overruled by *Reg.* v. *Wilson*. (2) I think that the latter case shews that the language attributed to Blackburn J. is somewhat too wide, but I do not think that it overrules it. The Act as applied to the particular State is no doubt limited by the terms of the treaty, but it is not therefore every condition to be found in the treaty that is essential to the legality of an arrest and detention under the Act. It is essential that the offence for which the prisoner is sought to be surrendered should be one of those specified in the treaty, but I do not think that a mere defect in the procedure prescribed by the treaty is sufficient to invalidate the warrant.

CHANNELL J. I am of the same opinion. This rule was obtained on the ground that the prisoner was entitled to be discharged from custody by art. 9 of the treaty with France because no requisition had been made in the manner directed by the treaty within fourteen days of the arrest. It was suggested by counsel who moved the rule that the words in art. 9 " by articles 2 and 4 " might be left out as having no meaning. It may be that they are insensible and that the proper way of reading the words at the end of art. 9 is as though they were " in the manner directed by this treaty." But inasmuch as the applicant has to make out affirmatively his right to be discharged, I agree with my brother that the failure to shew that the requisition was not made in the manner directed by arts. 2 and 4 might be of itself a sufficient reason for discharging this rule. But suppose we read it in the way suggested. The machinery of extradition is carried out by means of a general Act, which Act, however, would by itself have no operation at all because it only applies to cases where a treaty has been made with some foreign country. But when a treaty has been made the Act is brought into operation by an Order in Council, which Order by s. 2 of the Act embodies the terms of the treaty. Then by s. 5, " When an Order applying this Act has been published in the *London Gazette* this Act . . . . shall, so long as the Order

(1) L. R. 8 Q. B. 410. (2) 3 Q. B. D. 42.

remains in force, but subject to the limitations, restrictions, conditions, exceptions and qualifications, if any, contained in the Order, apply in the case of such foreign State." So that the Act in its application to the particular State is treated as incorporating the Order in Council and the treaty. The whole three have to be read together. Then supposing that they are read together, can the fact that the requisition of the foreign Government was not accompanied by the depositions mentioned in art. 7 give the prisoner a right to be discharged? I think not. The object of requiring that those depositions should be sent together with the requisition was simply to give information to the Secretary of State, to assist him to act upon it, and to enable this country to do what by the treaty it had undertaken to do, namely, to find the offender and when found to surrender him. If the Secretary of State has got the information from other sources, and, without having received the depositions mentioned in art. 7 sends his order to the magistrate to issue his warrant, and the magistrate acts upon it, that is no ground for the man being discharged from custody. I think that the provisions of art. 7 are mere machinery, and that non-compliance with them does not affect the jurisdiction of the magistrate to order either the arrest or the detention of the offender. I agree that the rule must be discharged.

*Rule discharged.*

Solicitor for respondent: *Director of Public Prosecutions.*
Solicitor for applicant: *J. Barrington Matthews.*

J. F. C.

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*April 5.*

## PRATT *v.* MARTIN.

*Game—Trespass in pursuit of—"Entering or being upon" the Land—Absence of Personal Entry—Game Act*, 1831 (1 & 2 *Will.* 4, *c.* 32), *s.* 30.

By s. 30 of the Game Act, 1831, "If any person whatsoever shall commit any trespass by entering or being . . . . upon any land in search or pursuit of game" he shall be guilty of an offence :—

*Held*, that a personal entry upon the land by the defendant is necessary to satisfy the terms of the section, and that it is not enough to send a dog on to the land in search or pursuit of game.

Dicta in *Reg.* v. *Pratt*, (1855) 4 E. & B. 860, followed.

Case stated by justices of Huntingdon.

An information was laid by the respondent Martin, a gamekeeper, against the appellant, charging that he on December 12, 1910, committed a trespass by entering and being on certain land in the parish of Orton Longueville, in the occupation of the Marquis of Huntly, in pursuit of game.

At the hearing the following facts were proved :—

The parish of Orton Longueville is divided from the parish of Yaxley by a small brook, and at the spot at which the occurrence took place there is on the north or Orton Longueville side of the brook a small spinney in the occupation of Lord Huntly. The land in the parish of Yaxley on the south side of the brook is part of a farm occupied by a Mr. Babb. The appellant was lawfully on Mr. Babb's farm for the purpose of shooting game. The appellant with a gun and dog came from the south over Babb's land until he arrived at the brook where it adjoins the spinney. He waved his dog across the brook into the spinney. The dog put up a pheasant in the spinney, which the appellant shot at and killed, the bird dropping in the spinney. The dog retrieved the bird and carried it across the brook to the appellant, who took it from the dog. There was no evidence that the appellant was ever off the land occupied by Babb while so doing. The appellant contended that there was no proof of any personal "entering or being upon" the land of Lord Huntly within the meaning of the section. The justices convicted him subject to a case for the opinion of the Court.

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*Foà*, for the appellant. It is not disputed that the appellant in sending the dog on to Lord Huntly's land committed a civil trespass, but the Game Act requires something more. In order to satisfy that statute there must be a trespass by "entering or being upon" the land. In *Reg.* v. *Pratt* (1) the defendant was on a public road carrying a gun and accompanied by a dog. The land on both sides of the road was the property of the same owner, who was also lord of the manor, and on one side of the road was a cover. The defendant waved his hand to the dog, which entered the cover and put up a pheasant. The defendant while standing on the road fired at it and missed it. On those facts it was held that, as the soil of the road was the property of the adjoining owner subject to the right of passage by the public, and as the defendant was on the road, not in the exercise of a right of passage, but for the purpose of searching for game, he was rightly convicted under s. 30 of the Game Act of trespassing on the land of the adjoining owner in search of game. But both Lord Campbell C.J. and Crompton J. were of opinion that merely sending the dog on to the land was not enough, and that, consequently, if the defendant instead of being on a high road had been upon his own land, the conviction could not have been supported. Lord Campbell said, "After considering the language of the enactment I think that the Legislature contemplated that the offender must personally be or enter on the land. Had the words been only 'commit any trespass on land in pursuit of game' I should have said that sending a dog upon the land was within the meaning of the words; but when I find the words are 'commit any trespass by entering or being . . . . upon any land' I think that the construction of the section is that there must be a personal entering and being on the land." And Crompton J. said, "I think the sending in of the dog into the cover was not a sufficient entry within the meaning of this Act. I do not think that the Act makes every entry, which would be the subject of an action at common law, an offence if done in pursuit of game; for the words 'by entering and being' seem to me restrictive, and shew that a bodily presence in the close is required."

No counsel appeared upon the other side.

(1) 4 E. & B. 860.

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LORD ALVERSTONE C.J. I regret to have to come to the conclusion that this appeal must succeed. I do not say what view I should have taken if the case had been one of the first impression. For although the section speaks of a "trespass by entering or being . . . . upon any land" it seems to me a not unreasonable view that sending a dog on to another person's land in search of game is a trespass within the section. But the view taken by the judges in *Reg.* v. *Pratt* (1) was that in order to constitute an offence against the section there must be a personal entry upon the land. No doubt those expressions of opinion were obiter, as there was clearly an unlawful entry in that case upon the highway. But the case is an old one, having been decided as long ago as 1855, and the dicta in question have never been dissented from. Under those circumstances, having regard to the desirability of decisions being uniform, I do not feel myself at liberty to dissent.

BRAY J. I am of the same opinion. But I am inclined to go further than my Lord. Even without the authority of *Reg.* v. *Pratt* (1) I should have come to the same conclusion. The appellant did not enter or be upon the land.

BANKES J. I agree.

*Appeal allowed.*

Solicitors for appellant: *Sturton & Sturton, for W. H. Sturton, Peterborough.*

(1) 4 E. & B. 860.

J. F. C.

## RAULIN *v.* FISCHER.

1911
*Feb.* 2.

*Foreign Judgment—Criminal Prosecution for Negligence—"Partie Civile" Award of Damages, when enforceable here.*

By the French law, where an offender is prosecuted for a crime, a person who was injured by the crime may intervene in the prosecution and put in a claim for damages, which claim is tried along with the criminal charge, and upon conviction punishment for the offence and damages for the injury may be awarded by the same judgment:—

*Held*, that in such a case the judgment is severable, and that the portion of it awarding damages to the injured person is not within the rule of international law which prohibits Courts of justice from executing the penal judgments of a foreign Court, but may be enforced by action in this country.

Trial before Hamilton J. without a jury.

The defendant, an American lady, while recklessly galloping her horse in the Avenue du Bois de Boulogne in Paris ran into the plaintiff, a French officer, and seriously injured him. For her act of criminal negligence in so riding the defendant was prosecuted at the instance of the Procureur de la République before the Civil Court of First Instance of the Department of the Seine sitting as a correctional tribunal, under art. 320 of the Penal Code. By the provisions of the Code d'Instruction Criminelle a person who is injured by a criminal act may intervene in the prosecution (*action publique*) and put in a claim for damages, whereupon his claim (*action civile*) is tried along with the *action publique* and one judgment is pronounced on both. (1) The plaintiff, M. Raulin, intervened in the

(1) By the Code d'Instruction Criminelle—

Art. 1: "L'action pour l'application des peines n'appartient qu'aux fonctionnaires auxquels elle est confiée par la loi. L'action en réparation du dommage causé par un crime, par un délit ou par une contravention, peut être exercée par tous ceux qui ont souffert de ce dommage."

Art. 2.: "L'action publique, pour l'application de la peine, s'éteint par la mort du prévenu. L'action civile pour la réparation du dommage peut être exercée contre le prévenu et contre ses représentants."

Art. 3: "L'action civile peut être poursuivie en même temps et devant les mêmes juges que l'action publique. Elle peut aussi l'être séparément: dans ce cas l'exercice en est suspendu tant qu'il n'a pas été prononcé définitivement sur l'action publique intentée avant ou pendant la poursuite de l'action civile."

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prosecution and claimed damages. At the hearing on December 1, 1909, the defendant, who did not appear, was convicted and was sentenced to one month's imprisonment and a fine of 100 francs. On the claim for damages, the Court, not having sufficient evidence before it as to the extent of the injury, made an order for the examination of the plaintiff by an expert, and in the meantime made a provisional award of 5000 francs damages. The defendant then appeared by counsel and applied to have the conviction and judgment set aside. The application was heard on March 9, 1910, when the judgment was confirmed except so far as it ordered a month's imprisonment. Subsequently the expert made his report to the Court as to the extent of the plaintiff's injury, and thereupon the Court ordered the defendant to pay to the plaintiff as damages the sum of 15,000 francs, including the provisional sum of 5000 francs previously allowed, and 917 francs for costs. It was a term of the order that it should be enforced if necessary by the imprisonment of the defendant. Upon that judgment the present action was brought to recover the sum of 636*l.* 13*s.* 6*d.*, being the equivalent in English money of the 15,917 francs so ordered to be paid.

*Schiller*, for the plaintiff. The judgment of the French Court so far as it awarded damages to the plaintiff was a civil and not a penal judgment, and therefore it may be enforced here. By art. 3 of the Code d'Instruction Criminelle the party injured by a criminal act has an election whether he will have his claim for damages tried before the same judges who are entertaining the criminal action, or whether he will bring a separate action before a purely civil Court. But the choice of the former alternative does not make his claim and the judgment pronounced on it any the less a civil one. Even where the order imposing a fine and the award of damages are pronounced at the same time, the judgment is really twofold, part of it being penal and part civil. In Piggott on Foreign Judgments, 3rd ed., part i., p. 90, this very point is dealt with, and it is said, "By French law civil proceedings for the tort are allowed to be tacked on to criminal proceedings for the offence, the person injured being termed the *tiers parti*, and damages may be awarded. This

would seem to be a civil judgment recognizable in England in the usual way." There is no reason for saying that the judgment is not severable. The two matters are quite distinct, though for convenience they are tried in the same Court to avoid repetition of the evidence. The fact that whereas the *action publique* abates on the death of the accused the *action civile* survives against the representatives shews that the two are distinct, while the fact of the Court having ordered the payment of the damages to be enforced if necessary by imprisonment does not point to the conclusion that the Court treated the award of damages as part of a penal order. Before 1867 imprisonment for debt was the rule in all cases in France just as in England. By the Law of July 22, 1867, art. 1, "La contrainte par corps est supprimée en matière commerciale, civile et contre les étrangers." Art. 2.: "Elle est maintenue en matière criminelle correctionnelle et de simple police." Art. 4.: "Les arrêts et jugements contenant les condamnations en faveur des particuliers pour réparations de crimes, délits ou contraventions commis à leur préjudice sont, à leur diligence, signifiés et exécutés suivant les mêmes formes et voies de contrainte que les jugements portant les condamnations au profit de l'État." Art. 5.: "Les dispositions des articles qui précèdent s'étendent au cas où les condamnations ont été prononcées par les tribunaux civils au profit d'une partie lésée, pour réparation d'un crime, d'un délit ou d'une contravention reconnus par la juridiction criminelle." Those articles shew that imprisonment for debt is still preserved in all cases where the debt is for damages awarded for an injury caused by a criminal act, whether those damages were awarded upon an intervention by the injured party in the *action publique* (art. 4), or in an independent action before a civil Court (art. 5). But it could not be disputed that if the damages were awarded in an independent action the judgment would be a civil one notwithstanding that it was enforceable by imprisonment. Therefore equally in the other case the power to enforce the judgment by imprisonment cannot be the test of whether the judgment is civil or penal in its nature.

[A French *avocat* was called who stated that the French

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Courts treat the award of damages to an injured person who intervenes in the prosecution as a civil judgment.]

Even if the French Courts did not so treat it, it would be immaterial, for it is for this Court to decide whether the judgment sued on is criminal or civil: *Huntington* v. *Attrill*. (1)

*W. B. Murphy*, for the defendant. It is a well-settled rule of international law that the Court has no jurisdiction to entertain an action for the enforcement either directly or indirectly of a penal law of a foreign country: Dicey on the Conflict of Laws, 2nd ed., p. 207. The judgment here sued upon is within that rule. It was pronounced by a criminal tribunal as the result of a conviction for a crime, and it is not severable. It is analogous to the case of an order by a magistrate under the Malicious Injuries to Property Act, 1861, ordering the person convicted of an offence to pay compensation to the party aggrieved in addition to a fine or imprisonment. In such a case the order could not be severed, and in the event of its being reversed by a Divisional Court upon a point of law the complainant could not by limiting his appeal to so much of the order as ordered compensation avoid the objection that the order was made in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, and so entitle himself to carry the case to the Court of Appeal. The complainant in such a case has the option of prosecuting or of bringing a civil action, and if he elects to take the former course he takes it with its concomitant disadvantages. So in the case before the Court, if the injured person elects to intervene in the *action publique* instead of bringing an independent action, he does so with the disadvantage that he cannot enforce the judgment in the Courts of another country.

[An *avocat* called on behalf of the defendant conceded that the *receveur d'amendes*, who receives the fines on behalf of the State, does not levy execution for the damages. The injured person has to do that for himself. So that in such cases there are two executions.]

*Schiller* was not called on to reply.

HAMILTON J. On the judgment of the French Court the plaintiff is in my opinion entitled to recover the English

(1) [1893] A. C. 150.

equivalent of the 15,000 francs that have been awarded him as damages. It was not disputed by the defendant's counsel that he would be so entitled but for the rule of private international law that a penal judgment of a Court in one country cannot be enforced by action in another country. The point raised for the defendant was that the judgment sued on was in truth a penal judgment within that rule, and that though part of it might be more or less civil in its character there was no power in this Court to dissect the judgment and enforce here that part which was enforceable by action though the judgment as a whole was not enforceable. Although the French Courts might refuse to distinguish between the parts of a judgment which may be called principal and the parts which may be called accessory, the parts which are by way of punishment and the parts which are by way of civil remedy, it does not follow that the English Courts in dealing with a French judgment should take the same course. The rule which governs such a question is that laid down by the Privy Council in *Huntington* v. *Attrill.* (1) It was there held that, a judgment having been given by a New York Court against the respondent under a New York statute which imposed a liability for false representation, and an action having been brought in an Ontario Court upon that judgment, it was the duty of the Ontario Court to determine for itself whether the judgment sued on was a penal one or not, and that it was not bound by the interpretation put upon the statute by the New York Courts. Lord Watson said: "The Court . . . . must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would either directly or indirectly involve the execution of the penal law of another State. Were any other principle to guide its decision a Court might find itself in the position of giving effect in one case and denying effect in another to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal." He went on to refer to a passage in the judgment of Gray J. in *Wisconsin*

(1) [1893] A. C. 150.

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v. *Pelican Insurance Co.* (1): "The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of it's revenue or other municipal laws, and to all judgments for such penalties," and added, "Their Lordships do not hesitate to accept that exposition of the law, which in their opinion discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding in order to come within the scope of the rule must be in the nature of a suit in favour of the State whose law has been infringed." I have therefore to inquire first of all whether this judgment in so far as it concerns the present plaintiff is one for the satisfaction of a private wrong or for the punishment of an infraction of public law; and secondly whether, if it be as regards him only for the satisfaction of a private wrong, it is one which can be separated from the rest of the judgment, so that he may sue upon the judgment in spite of the fact that a considerable part of it relates to purely criminal proceedings. Certain French expert witnesses were called before me, and the effect of their evidence was this. In various respects the remedy in the form in which it was pursued differs from the form in which it might have been pursued. The result of M. Raulin having pursued his remedy for compensation by intervention in the prosecution instead of bringing a separate civil action was that he came before a Court especially assigned to criminal business. That Court decided both in the prosecution and in the civil intervention, and to that extent the plaintiff obtained his judgment from a correctional tribunal. But in other respects it does not appear to me that his remedy differed in its character from the remedy which he might have pursued by a separate civil action. The prosecution abates with the death of the accused. The civil remedy does not. The liability to imprisonment in order to enforce payment of the damages is in law an incident both of the intervention in the *action publique* and of the separate civil action. The course of procedure differs because, instead of the whole conduct of the action on the

(1) (1887) 127 U. S. 265.

intervener's side resting with the plaintiff as it would have done in civil proceedings, he has to adapt himself to the control of the proceedings by the Procurator of the Republic. But the issues remain unchanged. The issue between the Procurator and the accused was whether she had broken the law against driving negligently contained in art. 320 of the Penal Code. On that issue the contributory negligence of the plaintiff would have afforded no defence, but the contributory negligence of the plaintiff would have been material to the question of damages claimed by him as an intervening party, and that issue, if the facts justified it, would be raised just as much in the civil intervention in the *action publique* as it could in a separate *action civile*. It seems to me that there is no doubt that the public prosecution and private suit are two quite separate and distinct proceedings although they are for purposes of procedure combined in one. The judgment for the 15,000 francs is not in any respect a judgment in a proceeding "in favour of the State whose law has been infringed." It is a judgment in what is substantially a civil suit for the compensation of a person who has sustained a private wrong.

The other question is whether it is practicable to distinguish the portion of the adjudication which was not part of the criminal suit from that portion of it which was. In this connection certain decisions of French Courts were cited to me, but not much assistance is to be gained from them, especially in view of the evidence that according to the jurisprudence of France the decisions of the Courts are not binding even upon Courts of inferior jurisdiction unless they are pronounced in the same cause or matter, and, consequently, though the decisions of the Courts are constantly cited, they are cited by way of edification only and not as authority. In any case, according to the judgment of the Privy Council, this is not a matter in which I am bound by the view of the French Courts. It is one in which I must determine for myself whether the enforcement of the plaintiff's rights would either directly or indirectly involve the execution of the penal law of another State. In my opinion it would not. Moreover here the decision awarding the final damages was not even pronounced at the same time as the decision inflicting

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the fine. It was given at a time when the only issue being contested was of a private and civil character, and one with which the State had nothing whatever to do. I think the decision must be for the plaintiff. I am fortified in this view by the passage which has been cited from Sir Francis Piggott's work on Foreign Judgments in which he deals with this very provision of the French law, that civil proceedings for a tort are allowed to be tacked on to criminal proceedings for the offence and damages may be awarded to the person injured, and suggests that the award of damages in such case is a civil judgment recognizable in England in the usual way.

*Judgment for plaintiff.*

Solicitors for plaintiff: *Bristows, Cook & Carpmael.*
Solicitors for defendant: *Michael Abrahams & Co.*

J. F. C.

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*March* 23, 24, 31.

TIMES COLD STORAGE COMPANY *v.* LOWTHER & BLANKLEY (BY ORIGINAL ACTION).

LOWTHER & BLANKLEY *v.* TIMES COLD STORAGE COMPANY AND NEW ZEALAND SHIPPING COMPANY (BY COUNTER-CLAIM).

*Practice—County Court—Counter-claim—Adding Party—Alternative Causes of Action—County Court Rules*, 1903, *Order x., r.* 22.

A person cannot be joined as a defendant to a counter-claim, under Order x., r. 22, of the County Court Rules, 1903, against whom an alternative cause of action only is alleged.

APPEAL from the City of London Court.

In the original action the plaintiffs claimed from the defendants 17*l.* for the storage of certain sheep carcases ex steamship *Kumara*. The claim was admitted subject to a counter-claim, which was filed on September 30, 1910, against the Times Cold Storage Company (the original plaintiffs) and against the New Zealand Shipping Company "for damages for negligence and breach of duty and of contract jointly or in the alternative

separately" against each of the defendants to the counter-claim. On October 6 an order was made by the Registrar of the City of London Court adding the New Zealand Shipping Company as defendants to the counter-claim and ordering Lowther & Blankley to deliver further particulars of the counter-claim.

Further particulars were delivered on October 8 and were as follows:—"Messrs. Lowther & Blankley claim against the Times Cold Storage Company Limited and the New Zealand Shipping Company Limited for damages for negligence and breach of duty and of contract jointly, or in the alternative separately, against each such defendant on the counter-claim in that the Times Cold Storage Company Limited failed to collect from the New Zealand Shipping Company Limited and to store for Messrs. Lowther & Blankley on April 27, 28, and 29, 1910, the 84 sheep mentioned hereunder being a portion of 448 sheep contracted to be collected and stored by the Times Cold Storage Company Limited for Messrs. Lowther & Blankley $\frac{\text{and}}{\text{or}}$ the New Zealand Shipping Company Limited failed $\frac{\text{and}}{\text{or}}$ refused to deliver the said 84 sheep to the Times Cold Storage Company Limited or their agents in accordance with the terms of a bill of lading dated February 23, 1910, relating thereto of which bill of lading Messrs. Lowther & Blankley were on the said date holders in due course. In consequence whereof the said sheep were taken into store by the Port of London authority and Messrs. Lowther & Blankley were unable to obtain delivery of the same until July 8, 1910, thereby sustaining the damage alleged."

On the application of the New Zealand Shipping Company, Limited, further particulars of the counter-claim were ordered and were delivered as follows:—"(*a*) Particulars of the provisions of the contract relied upon of which a breach is alleged on the part of the New Zealand Shipping Company Limited:—The contract is a bill of lading dated February 23, 1910, to which the plaintiffs by counter-claim refer. By the bill of lading the goods were to be delivered at the Port of London and consignees or their assigns were to be ready to take delivery of the goods as soon as the ship was ready to discharge them, otherwise the master or agents should be at liberty to land and warehouse the goods or discharge

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them into a store-ship or hulk or into lighters or on a wharf as customary at the merchant's risk and expense. The breach was in not delivering to Cornell's vans on April 27, 28, and 29, if, as the Times Cold Storage Company Limited contend, Cornell's vans were in attendance on the vessel ready to receive the goods. The ship owners say in their letter of June 29, 1910, that Cornell's vans were not there when the carcases came to hand and consequently they were delivered to the store. (*b*) Particulars of the duty relied upon of which a breach is alleged by the New Zealand Shipping Company Limited:—The plaintiffs by counter-claim rely on the facts above stated. (*c*) Particulars of the precise acts or defaults of the New Zealand Shipping Company Limited relied upon as constituting negligence breach of duty and of contract; and (*d*) Particulars of the refusal alleged:—For acts and defaults the plaintiffs by counter-claim rely on the facts above stated which are repeated. The refusal is to be implied from such facts."

The New Zealand Shipping Company applied to Judge Rentoul for an order that their name be struck out as defendants to the counter-claim or that the counter-claim against them be dismissed. Judge Rentoul dismissed the application. The New Zealand Shipping Company appealed.

*A. A. Roche*, for the appellants, the New Zealand Shipping Company. The particulars of the counter-claim shew no joint cause of action against the two defendants to the counter-claim. There is no joint contract suggested nor any joint breach of contract, and the causes of action raised by the counter-claim are alternative and inconsistent. There is no power under Order x., r. 22, of the County Court Rules (1), or under the corresponding rule of the High Court, Order xxi., r. 11, to join as defendant to a counter-claim a person against whom there is only a claim

(1) County Court Rules, 1903, Order x., r. 22: "Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person, he may apply to the Court, under Order xiv., r. 2, to add the name of such person as a party to the counter-claim; and that rule, and the other provisions of Order xiv., and r. 21 of this Order, shall apply to a person made defendant to a counter-claim in the same manner as to a person made defendant to an action, or to a plaintiff made defendant to a counter-claim."

for relief in one of two inconsistent alternatives: *Evans* v. *Buck* (1); *Central African Trading Co.* v. *Grove*. (2) It is clear from the particulars that in the present case the claims against the two defendants to the counter-claim are alternative and inconsistent, for what is said, in substance, is that the Times Cold Storage Company broke their contract in not sending the carrier at the proper time to collect the carcases from the ship, and the New Zealand Shipping Company committed a breach of a different contract in failing or refusing to deliver the carcases to the carrier if he was in fact there. The rule as to adding parties as defendants to a counter-claim is narrower than the rule as to joinder of defendants to an original action, but even in the case of an original action it is not permissible to join defendants against whom different and alternative causes of action are alleged unless the same set of facts apply to each case, the only difference being as to the form of relief claimed. Even if Lowther & Blankley had been original plaintiffs they could not on these particulars have joined the Times Cold Storage Company and the New Zealand Shipping Company as defendants. [He referred to *Thompson* v. *London County Council* (3); *Sadler* v. *Great Western Ry. Co.* (4)]

[PHILLIMORE J. referred to *S. F. Edge, Ld.* v. *Weigel.* (5)]

*Morle*, for the respondents, Lowther & Blankley. Order x., r. 22, must be construed with reference to s. 24, sub-s. 3, of the Judicature Act, 1873, which first permitted counter-claims, and under that section any person may be added as defendant to a counter-claim against whom is claimed "relief relating to or connected with the original subject of the cause or matter." If a counter-claim against a third person comes within these words, it is a counter-claim which raises questions between the original defendant and plaintiff "along with some other person" within the meaning of Order x., r. 22, and it is immaterial that the cause of action against the two defendants to the counter-claim is not a joint but an alternative or inconsistent claim. In the present case "the original subject of the cause" is the

(1) (1876) 4 Ch. D. 432.
(2) (1879) 48 L. J. (Ex.) 510.
(3) [1899] 1 Q. B. 840.
(4) [1896] A. C. 450.
(5) (1907) 97 L. T. 447.

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claim for storage of sheep ; the counter-claim relates to certain other sheep which should have been stored, but which, owing to the fault of either the storage company or the shipping company, were not stored. The counter-claim against the latter is therefore "connected" with the original subject of the cause. The reason for the decision in *Evans* v. *Buck* (1) was that under the old practice in Chancery a bill could not be filed for alternative relief founded on inconsistent allegations, but, as appears from *Child* v. *Stenning* (2), Order XVI., r. 7, expressly provides for a claim for alternative relief against defendants when the plaintiff is in doubt as to the person from whom he is entitled to redress, and *Evans* v. *Buck* (1) cannot therefore be now regarded as an authority. The authorities are clear that persons can now be joined as defendants to an original action against whom relief is claimed in the alternative, whether the cause of action be contract or tort: *Bullock* v. *London General Omnibus Co.* (3); *Sanderson* v. *Blyth Theatre Co.* (4); *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co.* (5) The same principle as to alternative relief applies to counter-claims : *Turner* v. *Hednesford Gas Co.* (6) *Central African Trading Co.* v. *Grove* (7) is not in point, for in that case the defendant really was claiming an indemnity from the person whom he wished to join as defendant to the counter-claim, and clearly therefore it was not a case for a counter-claim against the plaintiffs and that person, but for third party procedure.

It is not admitted that this counter-claim is alternative only and not joint. It may well be that the respondents will be able to prove a case of joint negligence by the appellants and the original plaintiffs. (8)

(1) 4 Ch. D. 432.
(2) (1877) 5 Ch. D. 695.
(3) [1907] 1 K. B. 264.
(4) [1903] 2 K. B. 533.
(5) [1910] 2 K. B. 354.
(6) (1878) 3 Ex. D. 145.
(7) 48 L. J. (Ex.) 510.
(8) At the conclusion of the arguments the case was adjourned in order that the respondents might, if so advised, deliver further particulars alleging joint acts of negligence. Further particulars were subsequently delivered, but for the reasons given by Phillimore J. in delivering judgment, it is unnecessary to set them out in this report.

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*A. Cairns*, for the Cold Storage Company.

*A. A. Roche*, in reply, referred to *Honduras Inter-Oceanic Ry. Co.* v. *Tucker*. (1)

March 31. PHILLIMORE J. In my opinion this appeal must be allowed. The plaintiffs in the original action, the Times Cold Storage Company, claimed to recover from the defendants, Lowther & Blankley, the sum of 17*l.*, being the plaintiffs' charges in relation to the storage of certain carcases. The defendants admitted the plaintiffs' claim, but sought to set up a counter-claim against the Times Cold Storage Company and also against the New Zealand Shipping Company, either jointly or in the alternative separately. The counter-claim was brought against the Times Cold Storage Company as the persons whose duty it was to receive for the defendants certain other carcases from a vessel in the docks, but who had failed to do so. The counter-claim against the New Zealand Shipping Company, as appears from the further particulars, does not raise a joint cause of action against the shipping company and the storage company but an alternative cause of action only, for it is based on an alleged failure by the shipping company to deliver the carcases to the carrier (if he was in fact at the docks as the storage company contended) in accordance with the terms of a bill of lading of which Lowther & Blankley were the holders. It was, however, suggested in the course of the argument that the particulars were sufficiently wide to cover a case of joint negligence by the carrier as agent for the storage company, and by the master and crew of the vessel. We accordingly adjourned the case in order that further particulars of this suggested joint negligence might be delivered. Further particulars have now been delivered, but it is not necessary to refer to them, for they are not particulars of the joint case which was suggested, and, further, counsel declined to withdraw the alternative counter-claim which had been previously put forward against the New Zealand Shipping Company.

In these circumstances we must deal with the case on the footing that the defendant in the original action asserts his right

(1) (1877) 2 Ex. D. 301.

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to join as defendants to the counter-claim a party against whom relief is claimed in the alternative only and not jointly with the original plaintiffs. Whether that can be done depends on the construction to be placed on Order x., r. 22, of the County Court Rules, the first part of which is in the same terms as Order xxi., r. 11, of the Rules of the Supreme Court. Before discussing the meaning of that rule I desire to refer to a question, which was discussed in the course of the arguments, as to how far the right to frame an action against two or more defendants, sued jointly, severally, or in the alternative, has been affected by recent decisions. It does not appear to me to be necessary to consider those decisions, because, whatever may be done by a plaintiff in the way of joining two or more defendants in one action, the position of a defendant who seeks to counter-claim against the plaintiff and a third person is entirely different. The effect of joining as defendant to a counter-claim a third person against whom an independent case is going to be made may be to cause serious embarrassment to the plaintiff in the action and possibly to deprive him of his just rights against the defendant. If A. has a claim against B., the fact that B. has a claim against C. arising out of the same transaction but founded upon different rights and liabilities, affords no reason why B. should not discharge A.'s claim. The utmost that can be said is that if B. has a counter-claim against A. he may also join C. as a defendant to the counter-claim if, in the language of the rule, C. is, or may be, liable "along with" A. Order x., r. 22, says that "where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person, he may apply to the Court . . . . to add the name of such person as a party to the counter-claim." In my opinion "along with" does not mean diversely from or separately from, but means what it says, "along with," and a case in which an alternative remedy is counter-claimed against a third person is not a case in which the counter-claim raises questions between the defendant and the plaintiff along with that third person. In the present case the defendants seek to bring in the New Zealand Shipping Company, not to answer a joint case along with the Times Cold Storage Company, but to be parties to the litigation,

while a different case is raised against the latter, and it is only in the event of the failure of the counter-claim against the storage company that a case will have to be made out against the shipping company. That course appears to me to involve a hardship on the New Zealand Shipping Company and also on the Times Cold Storage Company, and in my opinion is not within the terms of the rule. This appeal must, therefore, be allowed.

BANKES J. I agree. During the course of the argument I felt considerable doubt as to what is the practice in the matter of joining third persons as defendants to a counter-claim. Two points were raised before us, first, whether under the decisions as they stand the New Zealand Shipping Company could have been added as defendants in an action at the instance of Lowther & Blankley; and, secondly, whether they could be so added or not, we were asked to decide whether they could be added as defendants to a counter-claim by Lowther & Blankley. So far as the question of adding them as defendants in an action is concerned I think the practice has been materially changed since the language of Order XVI. of the High Court Rules was altered to its present form. Before that alteration the decisions in *Smurthwaite* v. *Hannay* (1) and *Sadler* v. *Great Western Ry. Co.* (2) made it plain that Order XVI. applied only to joinder of parties and did not apply to joinder of causes of action. But it has been pointed out in *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co.* (3) (and I think we are bound by that decision) that since the alteration in the language of Order XVI. the rule does apply to causes of action as well as to parties, and, therefore, it is discretionary in the Court to say whether it will or will not allow a defendant to be added, even though the cause of action alleged against him may be a different cause of action from that alleged against his co-defendants. There is something to be said for the argument that, that being so, the same principle should be applied when one is considering whether a defendant should be added to a counter-claim. In my

(1) [1894] A. C. 494. (2) [1896] A. C. 450.
(3) [1910] 2 K. B. 354.

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opinion, however, upon the authorities, it has been decided that a defendant cannot under the words of Order x., r. 22, join a person as defendant to a counter-claim against whom he alleges that he has got an alternative cause of action, i.e., a cause of action in the event of his failing to succeed against the original plaintiff. The authorities have been called to our attention, and the one which seems to me to be most in favour of that view is *Central African Trading Co.* v. *Grove*. (1) That is a decision of the Court of Appeal and it is binding upon us. Apart from authority, there is in my opinion very good reason for following the practice I have indicated, because unless it is followed there is a grave danger of a plaintiff who seeks to recover an admitted debt from a defendant being gravely embarrassed if it is open to the defendant to keep the plaintiff out of his money until he has had an opportunity of establishing his case against some third party and not against the plaintiff at all. For these reasons I agree that this appeal must be allowed.

*Appeal allowed.*

Solicitors for appellants: *Peet & Manduell.*

Solicitors for respondents: *Lovell & White.*

Solicitors for the Times Cold Storage Company: *Cattarns & Cattarns.*

(1) 48 L. J. (Ex.) 510.

F. O. R.

## *In re* KITSON.

## *Ex parte* THOMAS SUGDEN & SON, LIMITED.

1911
*April* 3.

*Bankruptcy—Administration—Creditor of Deceased Debtor—Appeal—"Person aggrieved"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 104, 125.

The appellants, who were creditors of a deceased person, took out an originating summons for the administration of his estate in the Chancery Division. On the same day the respondents, who claimed to be creditors of the estate of the deceased in respect of goods supplied by them after his death for the purpose of his business, which was being carried on by his executrix, presented a petition under s. 125 of the Bankruptcy Act, 1883, praying for the administration of the estate of the deceased in bankruptcy. On this petition an order for administration in bankruptcy was made:—

*Held*, that the appellants were persons "aggrieved" by the order, and were, therefore, entitled to appeal against it.

*Held*, also, that the respondents were not creditors "of a deceased debtor" within s. 125, and that there was, consequently, no jurisdiction to make an order for administration in bankruptcy on their petition.

Appeal from the County Court of Yorkshire holden at Halifax.

Albert Kitson, who carried on business at Brighouse, under the style of A. Kitson & Son, as a grocer and cartage contractor, died on July 10, 1910. By his will he appointed his wife and two other persons to be trustees and executors thereof, and he devised and bequeathed all his real and personal estate to the trustees upon trust to sell and convert with power to the trustees to postpone the sale of any part of the estate for so long as they should think fit. The will was proved by the widow, the other two executors having renounced probate. The widow did not sell the business, but carried it on under the same style as before. At the date of his death the deceased was indebted to the appellants, the Union of London and Smiths Bank, Limited, in the sum of 971*l.*, and he also owed to the respondents, Thomas Sugden & Son, Limited, 290*l.* for goods supplied to the business. The respondents' debt was paid off by payments made between July and November, 1910, but on February 14, 1911, a further sum of 66*l.* was owing to them for goods supplied to the business

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since the death. On March 2, 1911, the appellants, whose debt had not been paid, took out an originating summons in the Chancery Division claiming administration of the estate of the deceased, the appointment of a receiver, and other relief. On the same date a petition was presented in the Halifax County Court by the respondents under s. 125 of the Bankruptcy Act, 1883 (1), alleging they were creditors of the estate of the deceased and praying for an order for the administration of the estate of the deceased according to the law of bankruptcy, and on March 7 the registrar of the county court made an order, with the consent of the widow, that the estate of the deceased be administered in bankruptcy. From this order the appellants appealed.

*C. A. Russell, K.C.*, and *Merlin*, for the appellants. The respondents are not creditors of a deceased debtor within s. 125 of the Bankruptcy Act, 1883, for the debt which was owing to them by the deceased at the date of his death was subsequently paid off. The respondents were therefore not in a position to present a petition under s. 125, and the order should not have been made. The appellants are persons "aggrieved" by that order within the meaning of s. 104, and are therefore entitled to appeal against it. If the receiving order stands the appellants will be unable to proceed with the administration proceedings, which they have instituted in the Chancery Division, and, further, the appellants will be unable to dispute, as they desire to do, that the respondents are creditors of the deceased or of his estate. [They cited *Ex parte Mason.* (2)]

*Hansell*, for the respondents. The meaning of the words "person aggrieved" was considered by James L.J. in *Ex parte Sidebotham* (3), where he said: "It is said that any person

(1) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125: "(1.) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy."

(2) (1880) 14 Ch. D. 71.

(3) (1880) 14 Ch. D. 458, at p. 465.

aggrieved by any order of the Court is entitled to appeal. But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." The appellants are not deprived of anything by the bankruptcy proceedings. The receiving order does not operate as a stay of the administration in Chancery. But, in any case, the mere fact that the estate is to be administered in bankruptcy instead of in Chancery does not afford the appellants any grievance, for their rights in both cases will be the same: *Ex parte Official Receiver, In re Gould.* (1) The decision in that case shews that none of the sections in the Bankruptcy Act which give to the trustee in bankruptcy a higher title to assets than the bankrupt himself possessed apply to the case of the administration of the estate of a deceased debtor under s. 125.

Secondly, the order appealed from was rightly made. Although the debt owing to the respondents at the date of the testator's death has been paid off, they are creditors of his estate in respect of debts incurred by the widow as executrix in carrying on the testator's business. A creditor of the estate of a deceased debtor is entitled to present a petition under s. 125. The object of the section is the administration of the estate of a deceased person, wherever it may be, and that may involve the payment of debts incurred by the estate after his death. Sect. 125, sub-s. 1, requires that the petition shall be "in the prescribed form," and according to the form of the petition (No. 11) the petitioner has to state that "the estate of the said A. B. is justly and truly indebted to me in the sum of £ ." [*Re Shorey* (2), *Hasluck* v. *Clark* (3), *Watkins* v. *Barnard* (4), and *Johnson* v. *Pickering* (5) were also referred to.]

*C. A. Russell, K.C.*, in reply. The appellants will be prejudiced

(1) (1887) 19 Q. B. D. 92.
(2) (1898) 79 L. T. 349.
(3) [1899] 1 Q. B. 699.
(4) [1897] 2 Q. B. 521.
(5) [1908] 1 K. B. 1.

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if the estate is administered in bankruptcy instead of in the Chancery Division, because in bankruptcy any question of proceeding against the executrix for misconduct will rest with the trustee in bankruptcy and the committee of inspection, whereas in a Chancery administration the appellants will have the conduct of the proceedings. Moreover, in a bankruptcy administration the trustee has power to disclaim onerous contracts: *In re Mellison* (1); but that is not so in a Chancery administration. [He also referred to *Re Millard.* (2)]

PHILLIMORE J. In this case one Kitson, who carried on business as a grocer and a cartage contractor, died on July 10, 1910. At the date of his death he owed a considerable sum of money to the appellants, the Union of London and Smiths Bank. The widow, who was sole executrix, carried on the business after her husband's death. It is unnecessary to inquire whether she acted rightly or wrongly in so doing, but the position after seven months was that, though she had paid off most of her husband's debts, including a debt owing to the respondents, she had not paid the appellants, and she had incurred some further debts, in connection with the business, with, amongst others, the respondents. On March 2, 1911, the respondents presented a petition in the county court for the administration of the estate in bankruptcy under s. 125 of the Bankruptcy Act, 1883. On the same day the appellants took out an administration summons in the Chancery Division. Neither party had notice of the proceedings taken by the other. The registrar of the county court having before him only the petitioning creditors and the executrix, who consented to an order, made an order for administration in bankruptcy. The appellants now claim the right to appeal against that order as persons aggrieved within s. 104. I agree that the mere fact that an order is wrongly made does not of itself give a grievance to a person not otherwise aggrieved, and we have, therefore, to consider first, whether the appellants are persons aggrieved, and, secondly, whether the order of the county court was rightly made.

If the order stands, the administration summons taken out by

(1) [1906] 2 K. B. 68. (2) (1895) 72 L. T. 823.

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the appellants will be useless. I do not say that the proceedings instituted by it will automatically cease, but I am sure that they would be stayed if any one thought it worth while to make an application for that purpose. It follows, therefore, that the advantages, whatever they may be, which would accrue to the appellants by reason of their having taken out an administration summons in the Chancery Division, will be lost to them, and they will probably also have incurred some costs. It is true that they can prove for their debt in the bankruptcy proceedings. But it must be remembered that the proof in bankruptcy has to be made, not to the Court, but to the satisfaction of the trustee in bankruptcy. Again, no proceedings can be taken against the executrix with regard to the way in which she has carried on the business of the deceased except by the trustee. No doubt the trustee can in some cases be urged on; but it is a difficult matter where there is a committee of inspection, and if it be the fact, as suggested, that this bankruptcy is the result of a collusive arrangement with the executrix, the trustee and the committee of inspection might decline to take proceedings on the footing that the executrix has committed a wilful default, whereas the appellants, having the charge of administration proceedings in the Chancery Division, would be quite unhampered in this respect, and they could take such steps as they thought proper, and it is possible that in this case there may be important matters to consider as to possibly wilful default by the executrix. There are, it is true, not many distinctions between administration under s. 125 of the Bankruptcy Act and administration in the Chancery Division, but there are some in addition to the creditor's power of instituting proceedings to which I have already referred. For example, there is the priority given to testamentary expenses by s. 125, sub-s. 7, and there is the right of disclaimer which cannot be exercised in a Chancery administration. These are, possibly, not such important matters as the fact that in bankruptcy the trustee is interposed as a sort of buffer between the creditor and the debtor. Chiefly on that ground and because the appellants ought not to be deprived of the fruits of litigation which they have properly instituted I have come to the conclusion that they are

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persons "aggrieved" by the order of the county court and are therefore entitled to appeal against it. That order is, in my opinion, as bad as it can be. The jurisdiction to make an order under s. 125 does not extend beyond the powers given by the section, which provides that "any creditor of a deceased debtor may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy." The respondents are not creditors of a deceased debtor. They claim to have become creditors, subsequently to the debtor's death, of the business which has been carried on by the executrix. There may be a question whether they have any claim against the estate of the deceased man and whether their remedy is not solely against the executrix personally, but in any case, not being creditors of a deceased debtor, they do not come within s. 125. For these reasons I am of opinion that this appeal must be allowed.

HORRIDGE J. I must admit that I have felt considerable difficulty as to whether the appellants are persons aggrieved by the order of the county court. I think that the position under an administration order in the Chancery Division is not entirely the same as under an administration order in bankruptcy. The right of disclaimer is, I think, a good instance of a difference between the two forms of proceeding. But although I have had great doubt, I am not prepared to differ from the conclusion at which my brother has arrived. As to the other point, I am clearly of opinion that this order was wrongly made, as the respondents were not creditors of a deceased debtor within s. 125.

*Appeal allowed.*

Solicitors for appellants: *Fielder, Jones & Harrison, for J. L. Sykes, Huddersfield.*

Solicitors for respondents: *Burn & Berridge, for Richardson, Brighouse.*

F. O. R.

## PHARMACEUTICAL SOCIETY *v.* JACKS.

1911
*April* 5.

*Pharmacy Acts—Poison—Sale—Poisonous Substance to be used in Agriculture or Horticulture—Bottle not Labelled with Name and Address of Seller—Failure to conform to Regulations — Penalty — Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *ss.* 15, 17—*Poisons and Pharmacy Act*, 1908 (8 *Edw.* 7, *c.* 55), *s.* 2.

Sect. 15 of the Pharmacy Act, 1868, provides that any person who shall sell poisons, not being a registered pharmaceutical chemist, or chemist and druggist, shall be liable to pay a penalty which may be sued for. By s. 2 of the Poisons and Pharmacy Act, 1908, s. 15 of the Act of 1868 shall not apply to a seller of poisonous substances to be used exclusively in agriculture and horticulture who is duly licensed under s. 2 of the Act of 1908 and who conforms to the regulations made under that Act.

The defendant, who was not a registered pharmaceutical chemist, or chemist and druggist, was duly licensed by a local authority under s. 2 of the Poisons and Pharmacy Act, 1908, to sell poisonous substances to be used exclusively in agriculture or horticulture. The defendant failed to conform to the regulations made under the Act of 1908, in that he sold a poisonous substance in a bottle which was not labelled with his name and address. The plaintiffs sued the defendant for the recovery of a penalty under s. 15 :—

*Held*, that the defendant was liable to pay a penalty under s. 15, and none the less so because the facts shewed that he had also committed an offence under s. 17 of the Act of 1868.

Appeal from the County Court of Staffordshire holden at Lichfield.

The plaintiffs claimed 5*l.*, the amount of a penalty alleged to have been incurred by the defendant on October 21, 1910, by having sold or kept open shop for the retailing, dispensing, or compounding of poison, to wit a poisonous vegetable alkaloid called "nicotine," contained in and forming part of the ingredients of a compound known as "XL all vaporising fumigator," contrary to the provisions of the Pharmacy Act, 1868, as amended by the Poisons and Pharmacy Act, 1908. (1)

(1) The Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15: "From and after December 31, 1868, any person who shall sell or keep an open shop for the retailing, dispensing, or compounding poisons, . . . . not being a duly registered pharmaceutical chemist, or chemist and druggist, . . . . or shall fail to conform with any regulation as to the keeping or selling of poisons made in pursuance of this Act, . . . . shall for every

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The defendant was duly licensed under s. 2 of the Poisons and Pharmacy Act, 1908, by a local authority for the purpose of selling poisonous substances to be used exclusively in agriculture or horticulture. The county court judge found as facts that on October 21, 1910, he sold to one Richardson a bottle of "XL all vaporising fumigator," a compound containing nicotine, which is a vegetable alkaloid poison within the meaning of Part I. of the schedule to the Act of 1908; and that at the time of the sale the bottle was not labelled with the name and address of the defendant. It was contended for the defendant that the action would not lie under s. 15 of the Act of 1868; that the proper course was to have reported the matter to the local authority in order that the licence of the defendant might be revoked, or to have proceeded before a Court of summary jurisdiction under

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such offence be liable to pay a penalty or sum of five pounds, and the same may be sued for, recovered, and dealt with in the manner provided by the Pharmacy Act for the recovery of penalties under that Act; . . . ."

Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 2: "(1.) So much of the Pharmacy Act, 1868, as makes it an offence for any person to sell or keep open shop for the sale of poisons, unless he is a duly registered pharmaceutical chemist or chemist and druggist and conforms to regulations made under section one of that Act, shall not apply in the case of poisonous substances to be used exclusively in agriculture or horticulture for the destruction of insects, fungi, or bacteria, or as sheep dips or weed killers, which are poisonous by reason of their containing arsenic, tobacco, or the alkaloids of tobacco, if the person so selling or keeping open shop is duly licensed for the purpose under this section by a local authority, and conforms to any regulations as to the keeping, transporting, and selling of poisons made under this section, but nothing in this section shall exempt any person so licensed from the requirements of any other provision of the Pharmacy Act, 1868, or of the Arsenic Act, 1851, relating to Poisons."

Regulations made by Order in Council, dated April 2, 1909, under s. 2 of the Poisons and Pharmacy Act, 1908: "8. A licence may be revoked or suspended for such term as the local authority think fit, if the local authority are satisfied that the licensee has failed to comply with the requirements of these regulations or of the Poisons Acts, or that the licensee is not a fit person to be entrusted with the sale of poisons."

"14. A poisonous substance shall not be sold except in an enclosed vessel or receptacle as received from the manufacturer, distinctly labelled with the name of the substance and the word 'Poison,' and with the name and address of the seller, and with a notice of the special purpose for which it has been prepared."

s. 17 of the Act of 1868. The county court judge gave judgment for the defendant.

The plaintiffs appealed.

*J. R. Atkin*, K.C., and *Glyn-Jones*, for the plaintiffs. On the facts found by the county court judge the plaintiffs were entitled to judgment. Under s. 15 of the Pharmacy Act, 1868, only a duly registered pharmaceutical chemist, or chemist and druggist, is allowed to sell poisons. Then by s. 2 of the Poisons and Pharmacy Act, 1908, there may be sales of certain poisonous substances for agricultural or horticultural purposes by persons who are not within the class specified in s. 15 of the Act of 1868, provided they fulfil two conditions, namely, they must be licensed by the local authority and they must conform to the regulations made under the Act of 1908. In the present case the defendant failed to comply with the regulation which requires the bottle to be labelled with the name and address of the seller. He has therefore not fulfilled the conditions which alone entitled him to sell poison, and he is in the same position as any other unqualified person who sells poison, that is to say, he is liable to a penalty under s. 15 of the Act of 1868. He is none the less liable under s. 15, because he may also be liable to a penalty under s. 17 of the Act of 1868 for the specific offence of selling poison without the name and address of the seller on the bottle, or because, having committed a breach of the regulations, he is liable under the regulations to have his licence revoked or suspended by the local authority.

*Bliss* (*R. O. B. Lane* with him), for the defendant. The decision of the county court judge was right. Sect. 15 of the Act of 1868 is a general section, dealing with the carrying on of the business of chemists and druggists. The failure to conform to the regulations which have to be observed in the sale of poisons (which is the real subject-matter of the plaintiffs' complaint in this case) is dealt with in s. 17, which makes it an offence punishable on summary conviction to sell poison in a bottle not labelled with the name and address of the seller. It is true that ss. 15 and 17 to a certain extent overlap, but reading the two sections together the right view is that the proceedings

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before justices are intended to be the only remedy in the case of a breach of one of the express provisions of s. 17. This view is borne out by the fact that the regulations made under the Act of 1908 do not contain any provision for the recovery of a penalty for a breach of the regulations, and the form of licence issued under these regulations requires that s. 17 shall be printed on the back of the licence. Further, in the case of the poisons dealt with in the Act of 1908, the licence of the local authority takes the place of the qualifications required under the Act of 1868, and as the defendant held a licence from the local authority at the time of this sale he committed no breach of s. 15, though he may have committed an offence under s. 17.

PHILLIMORE J. In this case an action was brought to recover a statutory penalty under s. 15 of the Pharmacy Act, 1868, the allegation being that the defendant, not being a registered pharmaceutical chemist, sold a certain poison. That allegation was proved, and the defendant sought to bring himself within the protection of s. 2 of the Poisons and Pharmacy Act, 1908, by shewing that he held a licence from a local authority permitting him to sell poisonous substances to be used exclusively in agriculture or horticulture. The answer of the plaintiffs to that defence is that the Act of 1908 imposes a twofold condition, that the seller of the poison must not only hold a licence but must also conform to the regulations made under the Act; and the county court judge has found as a fact that the defendant did not conform to the regulation, No. 14, which provides that the name and address of the seller of the poison must be labelled on the bottle. The answer to the plaintiffs' claim, stated in the way in which I have stated it, was well put by counsel for the defendant. He said that the cumulative effect of what has been proved is that the defendant has committed an offence under s. 17 of the Act of 1868, for which he is liable to a penalty recoverable on summary conviction before two justices. That is true, for s. 17 makes it an offence for any person, whether a registered pharmaceutical chemist or not, to sell any poison in a bottle which is not labelled with the name and address of the seller. But the fact that, in disproving the defence, the

plaintiffs incidentally proved facts which shewed that the defendant had committed an offence under s. 17 does not prevent the plaintiffs from relying on their statutory right to sue for a penalty under s. 15. That being so, this appeal must be allowed.

HORRIDGE J. I agree. On the facts of this case the defendant is liable under s. 15 of the Act of 1868, unless he can bring himself within the protection of the Act of 1908. He cannot do that, however, because he has failed to conform to the regulations made under that Act. The defendant none the less comes within s. 15, because he is also within s. 17. It is no answer to a claim under s. 15 to say that the defendant has also committed an offence under s. 17.

*Appeal allowed.*

Solicitors for plaintiffs: *Flux, Thompson & Quarrell, for Tunbridge & Co., Birmingham.*

Solicitors for defendant: *Rutter, Veitch & Bond, for T. G. Dobbs, Worcester.*

F. O. R.

1911
*April 4.*

## BARKER, Appellant *v.* ARNOLD, Respondent.

*Criminal Law—Evidence—Examination of Defendant—Question as to previous Conviction — Question disallowed — Validity of Conviction — Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*).

The appellant was charged before justices sitting as a Court of summary jurisdiction with an offence, and gave evidence on his own behalf. The solicitor who appeared for the prosecution asked the appellant in cross-examination whether he had been previously convicted of a similar offence. The justices disallowed the question, as being contrary to s. 1 (*f*) of the Criminal Evidence Act, 1898, and no answer was given to it, the solicitor, however, remarking that he had a certified copy of the conviction. The justices convicted the appellant, stating that the above-mentioned incident was entirely ignored by them in arriving at their decision:—

*Held* that, though the question ought not to have been asked or the observation made, yet inasmuch as the decision of the justices was not affected thereby the conviction was not invalid.

Case stated by justices for the county of Essex.

At a Court of summary jurisdiction holden at Rochford, in the county of Essex, an information was preferred by the respondent against the appellant charging that he, the appellant, on October 13, 1910, at Thundersley, in the said county, unlawfully did assault and beat the respondent.

Upon the hearing of the information it was proved that the appellant, who was the master of a public elementary school, did on October 13, 1910, at Thundersley beat the respondent, one of the school children, with a cane with undue severity.

During the hearing of the case the appellant was called as a witness on his own behalf by his counsel, and in cross-examination the solicitor for the respondent put to the appellant the question whether he had been previously convicted for a similar offence. No answer to the question was given by the appellant, as the justices at once stopped the respondent's solicitor, who abandoned it, remarking that he had a certified copy of the conviction. The incident thereupon closed without discussion, nor was the copy conviction tendered. No evidence was therefore before the justices in connection with the question, and the incident was entirely ignored by them in arriving at their decision.

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The justices convicted the appellant of the offence charged in the information and imposed a fine of 1*l.* and 4*s.* costs.

The question for the opinion of the Court was whether, having regard to the provisions of the Criminal Evidence Act, 1898 (1), the conviction of the appellant under the circumstances above stated was rendered invalid by reason of the question as to a previous conviction having been put to the appellant and the observation having been made by the respondent's solicitor that he had a certified copy of the conviction.

*T. A. Organ*, for the appellant. Sect. 1 (*f*) of the Criminal Evidence Act, 1898, provides that the person charged "shall not be asked" any question tending to shew that he has been convicted of an offence. The appellant was asked that very question, which is forbidden by the Act, and, that being so, the conviction cannot stand, even though the justices state that the incident was entirely ignored by them in arriving at their decision. The solicitor who appeared for the complainant moreover told the Court that the appellant had been previously convicted. In *Charnock* v. *Merchant* (2) the appellant was asked whether he had not been previously convicted of a similar offence, and the justices admitted the question. The appellant answered that he had been previously convicted. The justices having convicted him, this Court held that the question was not admissible and quashed the conviction, though the justices said that the answer as to the previous conviction had in no way affected their minds. That case is in point because, though the question in this case was disallowed, the observation made by the solicitor for the respondent that he had a certified copy of the conviction was the

(1) 61 & 62 Vict. c. 36, s. 1: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:—

. . . . .

"(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . ."

(2) [1900] 1 Q. B. 474.

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same as if the justices had allowed the question to be answered. The conviction ought therefore to be quashed.

*Abinger*, for the respondent. Though the question put to the appellant was an improper one, the justices state that they entirely ignored it in arriving at their decision. The effect, therefore, was the same as if the question had not been put. There was no substantial miscarriage of justice, and the Court will not quash the conviction. On an appeal under the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4, sub-s. 1, express power is given to the Court to dismiss the appeal, though the point raised might be decided in favour of the appellant, if they consider that no substantial miscarriage of justice has actually occurred. The principle embodied in that section applies here.

*T. A. Organ* in reply.

LORD ALVERSTONE C.J. In my opinion this appeal fails. As was pointed out in the case of *Rex* v. *Ellis* (1), s. 1 (*f*) of the Criminal Evidence Act, 1898, not merely protects a person charged with an offence against being obliged to answer a question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, but forbids the question being asked. The question, therefore, is an improper one forbidden by the Act, and undoubtedly if such a question is put a prima facie case arises for quashing the conviction, because this Court cannot say whether the minds of the justices may not have been affected thereby. The Act, however, does not provide that the asking of the question shall render the conviction bad. Sect. 1 (*f*) lays down a rule of practice and procedure as regards the right to put such a question. In these circumstances we have no definite legislative provision to guide us, and the Act does not contain a clause similar to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, which gives the Court power to dismiss an appeal under that Act against a conviction if they think that no substantial miscarriage of justice has actually occurred. Though we have not the assistance of such a clause as that, it seems to me that, where

(1) [1910] 2 K. B. 746, at pp. 763, 764.

the case is being heard by justices sitting without a jury, and the justices have disallowed the question and state that the incident, including both the question and the observation made by the solicitor who appeared for the prosecution, was entirely ignored by them in arriving at their decision, we ought not to say that merely asking the question and making the observation render the conviction invalid. The appeal will therefore be dismissed.

BRAY J. I am of the same opinion. We cannot quash this conviction unless we come to the conclusion that if such a question is merely asked the conviction must in every case be quashed. I decline to go that length. The Act, though prohibiting the question, has not said that if the question is asked the conviction shall be bad. Therefore we must see whether the circumstances are such that the conviction ought to be quashed. The question as to an alleged previous conviction was asked and was at once disallowed, and the justices have stated that the question and the observation made thereon by the respondent's solicitor were entirely ignored by them in arriving at their decision, that is to say, that the incident did not affect their judgment. In these circumstances that which might have been a prima facie case for quashing the conviction is rebutted. No injustice has been done, and therefore we ought not to set aside the conviction.

BANKES J. I agree. This is an appeal from justices by means of a case stated, and it seems to me that upon the facts stated in the case we can only give one answer to the question put to us. The question of law which we have to answer is whether the conviction is as a matter of law rendered invalid by reason of an improper question as to an alleged previous conviction having been put to the appellant, the question being at once disallowed and not answered, and by reason of an improper observation having been made thereon by the respondent's solicitor, the justices stating in effect that they paid no attention either to the question or to the observation, which were both entirely ignored by them in arriving at their decision. It seems to me that in these

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BARKER v. ARNOLD.

circumstances it is impossible to say as a matter of law that the conviction is invalid.

*Appeal dismissed.*

Solicitors for appellant: *Baker & Nairne.*
Solicitors for respondent: *Philbrick & Co.*

W. F. B

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C. A.

1911

*March* 27.

[IN THE COURT OF APPEAL.]

## COAKER *v.* WILLCOCKS.

*Common—Obligation to fence adjoining Land—Extent of Obligation—Sheep Damage Feasant—Distress—Impounding—Pound in same Hundred, but more than Three Miles distant*—1 & 2 *Ph. & M. c.* 12, *s.* 1.

Sheep of the plaintiff, having strayed from unenclosed land forming part of Dartmoor Forest, over which the plaintiff had rights of common, including the right of pasturage for sheep and other commonable beasts, into an adjoining close which belonged to the defendant, were there distrained by him damage feasant, and were impounded by him in a pound within the same hundred, but more than three miles distant from the place where the distress was taken. In an action by the plaintiff against the defendant for a wrongful distress, and for breach of s. 1 of 1 & 2 Ph. & M. c. 12, it was admitted by the defendant for the purposes of the case that he was bound to fence his holding against moorland cattle, including sheep. The plaintiff alleged that the distress was wrongful because the sheep had strayed into the defendant's close through the defendant's breach of his obligation to fence, in having insufficient fences. The sheep in question were Scotch sheep, which possessed extraordinary powers of jumping. It appeared that neither the defendant's fences, nor Dartmoor fences generally, were constructed to keep out Scotch sheep, for which kind of sheep special fences were necessary, but that the defendant's fences were sufficient for keeping out the ordinary moorland sheep:—

*Held*, as a matter of inference from facts before the Court, that the obligation upon the defendant was only to maintain fences such as were usual on Dartmoor, and sufficient to keep out ordinary sheep, and not such fences as would keep out sheep which, like Scotch sheep, possessed extraordinary jumping powers; that, on the true construction of 1 & 2 Ph. & M. c. 12, s. 1, a distrainor of cattle damage feasant may drive the distress to any pound within the hundred,

although it be more than three miles from the place where the distress was taken; and, therefore, that the defendant was entitled to judgment.

Decision of the Divisional Court ([1911] 1 K. B. 649) affirmed, though on somewhat different grounds as to the first-mentioned point.

APPEAL from the judgment of a Divisional Court (Darling J. and Bucknill J.) upon an appeal from the county court of Devonshire holden at Tavistock.

The action in the county court was for a wrongful distress, and for breach of the provisions of 1 & 2 Ph. & M. c. 12, s. 1.

The facts are fully stated in the report of the case in the Court below (1) and for the purposes of this report may be briefly stated as follows.

The plaintiff was entitled to, and in the enjoyment of, rights of common, including the right of pasturage for sheep and other commonable beasts, upon unenclosed land which was part of the Forest of Dartmoor.

The defendant was the occupier of a "newtake," or farm which had been enclosed from land forming part of the same forest. For the purposes of this case it was admitted by the defendant that he was bound to fence his holding against moorland cattle, including sheep.

Sheep of the plaintiff, which were put to graze on the unenclosed land, strayed into the defendant's land, and were there distrained by him damage feasant, and were driven by him to a pound within the same hundred, but more than three miles distant from the place where the distress was taken. The plaintiff alleged that the distress was wrongful because the sheep had strayed into the defendant's land through the defendant's breach of his obligation to fence his land, in having an insufficient fence, and also that the defendant had contravened the provisions of the statute 1 & 2 Ph. & M. c. 12, s. 1, by driving the sheep to a pound more than three miles distant from the defendant's land where the sheep were distrained.

The defendant counterclaimed damages for trespass.

At the trial in the county court, by consent of the parties, it was referred to Mr. Barrington, steward of the Duchy of Cornwall, a person having special information and knowledge concerning

(1) [1911] 1 K. B. 649.

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the matter in question, to report to the Court upon the facts of the case, and he accordingly made a report to the county court, the effect of which is stated in the report of this case in the Court below (1), and, so far as is material to this report, may be gathered from the judgment of Vaughan Williams L.J. It appeared therefrom that neither the defendant's fences nor Dartmoor fences generally were constructed to keep out Scotch sheep, for which kind of sheep special fences were necessary; and that the defendant's fences were in a reasonably fit and proper condition to fence out moorland sheep, but not Scotch sheep.

The county court judge gave judgment for the defendant on the claim and counter-claim.

The Divisional Court affirmed his judgment. (1)

*Aggs*, for the plaintiff. The Divisional Court decided the first point in this case upon the principle laid down in *Child* v. *Hearn* (2), but that principle is not applicable here.

[VAUGHAN WILLIAMS L.J. It is difficult to see how what was said in that case can apply to the present. It related to the extent of the obligation to fence imposed upon a railway company by the express terms of a statute, namely, the Railways Clauses Consolidation Act, 1845, s. 68. The question in this case is whether the obligation of the defendant to fence, which has been admitted as regards moorland cattle, including sheep, can, upon the facts before us, be considered as extending to these Scotch sheep.]

It must be taken upon the admission made by the defendant that there was an obligation upon the defendant to fence his land as against all commonable beasts, including sheep, such obligation being presumably of a manorial character. The fallacy in the judgment of the Divisional Court lay in the assumption that, under the circumstances, the onus was on the plaintiff of proving that the defendant's admitted obligation to fence extended to Scotch sheep. It is submitted that, upon the defendant's admission, the onus was shifted upon him of shewing that his obligation to fence against sheep was subject to any and, if so, what special restrictions. The obligation to fence as between commoners and the defendant as the holder of a newtake must have arisen at

(1) [1911] 1 K. B. 649. (2) (1874) L. R. 9 Ex. 176.

the time of the defendant's becoming holder of the newtake, and upon his admission it was for him to shew as part of his title what the terms of that obligation were.

[FARWELL L.J. There being no obligation at common law upon an owner of land to fence for the purpose of keeping other people's beasts out of his land, the onus lies on the plaintiff of shewing that there was an obligation on the defendant to fence against the sheep in question, in order to entitle him to complain of those sheep having been distrained damage feasant.

KENNEDY L.J. Can the obligation admitted be taken to be to maintain anything beyond a reasonable fence? Is not the finding of Mr. Barrington in his report in effect that the defendant's fence was reasonably sufficient to keep out the animals that under the circumstances might reasonably be expected to be on the common, namely, the ordinary moorland sheep?]

There was no evidence, and it really was not suggested in the county court, and there is no finding in Mr. Barrington's report, that Scotch sheep were not commonable on Dartmoor; and presumably the obligation of the defendant was to provide such a fence as would keep out all animals commonable there.

[FARWELL L.J. There does not appear in this case to be really any evidence of immemorial custom as to the obligation to fence. In bygone times Scotland was a separate kingdom, and there could hardly have been an immemorial right of common on Dartmoor for Scotch sheep.

VAUGHAN WILLIAMS L.J. I fear that, owing to the course which this case took in the county court, the questions which ought really to have been decided for the purpose of rightly determining this case were not sufficiently dealt with there. The question is who is to suffer in consequence? It must, I think, be the plaintiff, on whom the onus lay of proving the defendant's obligation to fence so as to keep out these sheep.]

Prima facie the obligation of the defendant, as admitted, would appear to apply to all commonable animals; it was not suggested that the plaintiff's sheep were not rightfully on the common land. It was for the defendant to prove that Scotch

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sheep constituted an exception from the obligation. [He cited on this point Gale on Easements, 8th ed. p. 466; *Lawrence* v. *Jenkins* (1); *Wiseman* v. *Booker*. (2)]

With regard to the second ground of action, the statute 3 Edw. 1, c. 16, prohibited the driving of the distress out of the county in which it was taken. Then by 1 & 2 Ph. & M. c. 12 it was enacted that no distress of cattle should be driven out of the hundred, rape, wapentake, or lathe where the distress was taken "excepte it bee to a Pownde overte within the said Shyre, not above three myles distante from the place where the said Distresse ys taken." A rape or lathe generally contains three or four hundreds, so that the areas mentioned in the first part of the section are not of similar extent. The professional opinion with regard to this enactment seems generally to have been that the proper construction of the statute is that the word "not" should be read as equivalent to "nor," and that the effect of the section is that the pound must be within the county and not more than three miles from the place where the distress was taken. [He cited on this point Woodfall, Landlord and Tenant, 1st ed. (1822), p. 320; 18th ed. (1908), p. 547; Foà, Landlord and Tenant, 4th ed., p. 542; *Berdsley* v. *Pilkington*. (3)]

[VAUGHAN WILLIAMS L.J. referred to Gilbert on Distress, 4th ed., p. 62.]

*J. A. Hawke*, for the defendant, was stopped on the point with regard to the construction of 1 & 2 Ph. & M. c. 12, s. 1.

[VAUGHAN WILLIAMS L.J. With regard to the defendant's obligation to fence, it does not appear really that there were any findings in the county court on questions which are material in this case, one of those questions being whether Scotch sheep are commonable animals on Dartmoor. Was it admitted by the defendant that they were?]

The admissions appear to have been that sheep were commonable animals on Dartmoor and that the defendant was bound to fence against sheep, but there appears to have been no admission either way as to whether Scotch sheep were commonable animals, or whether the defendant was bound to fence

(1) (1873) L. R. 8 Q. B. 274. (2) (1878) 3 C. P. D. 184.
(3) (1588) Gouldsborough, 100.

against them. It is contended that that is really immaterial, and that the Divisional Court decided the case rightly, upon the principle laid down in *Child* v. *Hearn*. (1) What was said there may, it is submitted, be applied to the present case. It has been held that the obligation to fence created by the Railways Clauses Consolidation Act, 1845, s. 68, is equivalent to the obligation under a prescriptive liability to fence at common law. It is found in effect by Mr. Barrington in his report that the defendant's fence was of the same kind as was usual all over the moor, and was quite sufficient to keep out the ordinary moorland sheep. If it were held that there was an absolute obligation to fence so as to keep out such sheep as these, it would involve raising the fences all over the moor to the extent of three feet, and perhaps putting up a different kind of fence from that now in use. The reasonable inference from the facts, as appears from Mr. Barrington's report, is that the obligation upon the defendant was only to put up a sufficient fence to keep out the ordinary moorland sheep.

[He was then stopped.]

*Aggs* in reply.

VAUGHAN WILLIAMS L.J. I am of opinion that the judgment of the county court judge and of the Divisional Court must be affirmed. I do not think that the course taken upon the trial of this case in the county court has resulted in a very satisfactory trial. It would have been more satisfactory if there had been distinct findings as to whether Scotch sheep were commonable sheep on Dartmoor, and I should have liked to know how long it is since Scotch sheep were first allowed to graze on the common land, and also to know more about the origin of the right which the plaintiff claims of having the defendant's land fenced off from the common. We must, however, decide the case on the materials which we have before us. All that we really have before us, beyond the admission made by the defendant, is the report made by Mr. Barrington by consent of the parties. Besides having the facts found by him in that report to guide us, I think that one must draw any reasonable inferences of

(1) L. R. 9 Ex. 176.

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fact which may be drawn from that report. No one can read that report without seeing that Mr. Barrington draws a distinction for the purposes of the case between Scotch sheep and the ordinary moorland sheep; and, on looking at his report, one may draw the inference of fact, even if it is not positively stated, that a different kind of fence, a higher or stronger one, is necessary for the purpose of keeping out Scotch sheep than is required in the case of other sheep. As I understand the judgment of the Divisional Court, it really turned upon the question, what was the extent of the obligation, which had been admitted in general terms by the defendant, to fence the defendant's land from the common so as to prevent the cattle grazing on the common, including sheep, from straying on to it? The Divisional Court came to the conclusion that the obligation was not an absolute obligation, and therefore it became necessary to see how far it extended. In my opinion the conclusion to which they came as to its extent—though I am not quite sure that they put it on that ground—was justified by the findings of Mr. Barrington in his report. Those findings appear to me to be in effect that the walls or fences which have been provided for the purpose of keeping out cattle grazing on the unenclosed land of Dartmoor have for a very long time, at any rate for a time as long as his experience extended, been all of the same character, and not of such a character as would keep out sheep like Scotch sheep, which are notoriously very hard to keep in or out, being possessed of great powers of jumping. He appears to me to limit the obligation to fence by reference to that fact, and, on the whole, I have, upon the facts before us, come to the conclusion, basing it entirely on the facts found by him and the inferences to be drawn from his report, that we must treat the fact of the sheep in question having trespassed upon the defendant's new-take as, not the fault of the defendant by reason of his not having kept them out, but the fault of the plaintiff himself, who, in the absence of proof of an obligation upon the defendant to keep out sheep of this kind by fencing, was under an obligation to keep his sheep off his neighbour's land. I come to the conclusion in this case that there was shewn no absolute obligation on the defendant to have such a fence as would keep out all sorts of

sheep, but only an obligation to have such a fence as was usual on Dartmoor for the purpose of keeping sheep out of the adjacent enclosed lands, which obligation the defendant had fulfilled, for it is not suggested that the defendant's fence was not of the usual height, or that it was out of repair.

The only other question is as to the distance and position of the pound to which the sheep were driven. The pound was in the same hundred, but it was, as I understand, more than three miles from the place where the distress was taken. I admit that the construction of the statute 1 & 2 Ph. & M. c. 12, s. 1, is a little difficult, but I have come to the conclusion that it must be construed in the manner in which the Divisional Court has construed it. For these reasons I think that the appeal must be dismissed.

FARWELL L.J. I am of the same opinion. I do not think it satisfactory that this case, which might have involved several interesting points, should have to be decided on materials which are little more than hypothetical. It appears to have been admitted by the defendant that he was under an obligation to the plaintiff to fence his holding against moorland cattle, including sheep; but we have no evidence how this right arose, a matter which might be important; whether it arose from custom, or was in the nature of such a spurious easement as is mentioned in *Lawrence* v. *Jenkins* (1), or how otherwise it arose. Taking the facts, as we have them, I agree with Vaughan Williams L.J. that there was not an absolute obligation on the defendant to fence so as to keep out any sheep of however saltatory a character, and that he fulfilled his obligation by having such a fence as would keep out ordinary sheep.

On the other point I also agree. I think that the opinion expressed by the Serjeants in *Berdsley* v. *Pilkington* (2) was right.

KENNEDY L.J. I agree.

*Appeal dismissed.*

Solicitor for plaintiff: *H. Dobell, for J. P. Dobell, Plymouth.*

Solicitors for defendant: *Crowders, Vizard, Oldham & Co., for Windeatt & Windeatt, Totnes.*

(1) L. R. 8 Q. B. 274, 279. (2) Gouldsborough, 100.

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*March* 14, 15.

## BAKER and Others *v.* INGALL.

*Trade Union—Agreement embodying Substance of Rules—Agreement concerning Conditions of Employment—Agreement for Payment of Penalty—Agreement for Application of Funds to provide Benefit—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4.

By s. 4 of the Trade Union Act, 1871, it is enacted that nothing in the Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing (1.) any agreement between members of a trade union concerning the conditions on which any members of such trade union shall be employed; (2.) any agreement for the payment by any person of any penalty to a trade union; (3.) any agreement for the application of the funds of a trade union to provide benefits to members.

The defendant was a member of a friendly society registered under the Trade Union Acts, 1871 and 1876. By one of the rules of the society a member meeting with an accident and becoming totally incapacitated from following his employment for the remainder of his life was entitled to receive the sum of 100*l.*; and all members receiving such a benefit were obliged to sign an agreement that in the event of their returning to their trade they would refund to the society the amount of accident benefit received. If a member failed to refund, certain officers of the society were empowered to institute legal proceedings for the recovery of the amount received.

The defendant, having met with an accident and being apparently incapacitated for life from following his employment of a moulder in an iron foundry, made a claim and received from the society a sum of 100*l.* On receipt of that sum he signed an agreement that in case he should at any time thereafter resume work as an ironfounder he would forthwith pay to the society the sum of 100*l.*, and that in case that sum was not repaid within a period named, certain officers of the society should have power to sue and proceed against him in any Court of competent jurisdiction for the said sum.

The defendant was able to resume work as an ironfounder within the meaning of the agreement. In an action by the officers of the society against the defendant to recover the sum of 100*l.* under the agreement:—

*Held*, that the agreement was neither (1.) an agreement concerning the conditions on which a member of a trade union should be employed; nor (2.) an agreement for the payment of a penalty; nor (3.) an agreement for the application of the funds of a trade union to provide a benefit to a member, within the meaning of s. 4 of the Act.

*Held*, therefore, that the action was maintainable.

Appeal from the county court of Yorkshire holden at Sheffield.

The plaintiffs were John Thomas Baker, the president, William Matthew Lawson, the secretary, and Thomas William Tozeland, the late president, of the Friendly Society of Ironfounders of England, Ireland, and Wales, a trade union registered under the Trade Union Acts, 1871 and 1876 (34 & 35 Vict. c. 31 and 39 & 40 Vict. c. 22). They sued on behalf of themselves and all other the members of the society.

The defendant was a moulder in an iron foundry and a member of the society.

The rules of the society contained the following provisions:

Rule 25.—1. "Any twelve months' member owing not more than twelve weeks' contributions meeting with an accident and thereby losing or disabling a limb, or suffering from bodily ailment . . . . not caused by old age, but the result of an accident to a previously healthy organ, and who in consequence is totally incapacitated from following his employment as a metal founder or general core maker for the remainder of his life, shall, if not disentitled according to rule, receive the sum of 100*l*. . . . .

6. "All members receiving the accident benefit must sign an agreement that in the event of their returning to the trade they shall refund to the society the amount of accident benefit received . . . ." On failure by a member to refund under this sub-rule the council of the society were empowered to institute legal proceedings for the recovery of the amount received by the member.

On June 18, 1906, the defendant, being a twelve months' member and not owing twelve weeks' contributions, met with a severe accident while at his work and was to all appearances totally incapacitated from following his employment for the remainder of his life. He made a claim upon the society under rule 25, sub-rule 1, and received a sum of 100*l*., and signed an agreement in pursuance of sub-rule 6.

This agreement was dated August 29, 1907, and was made between the defendant of the one part and two persons being the president and corresponding secretary for the time being of the society of the other part. It recited rule 25, sub-rules 1 and 6, and, after further reciting that the defendant being a member of

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the society had represented to the society that he had been rendered permanently unable to follow his trade as an ironfounder through accident and had produced to the executive committee of the society satisfactory testimony of permanent disablement, and reciting finally that the sum of 100*l.* had on the signing of the agreement been paid to the defendant out of the funds of the society in pursuance of rule 25 and that the defendant acknowledged and declared that he had received the said sum of 100*l.* in full satisfaction and discharge of all benefits which he might claim under any of the rules of the society, continued as follows:—"Now these presents witness that in further pursuance of the said rule and in consideration of the premises the said Henry Ingall . . . . hereby agrees with"—the parties of the second part—"that in case the said Henry Ingall shall at any time hereafter resume work as an ironfounder the said Henry Ingall . . . . shall forthwith pay to the said society the sum of 100*l.* sterling so paid to him as aforesaid without any deduction or abatement whatsoever and that any earning of money by the said Henry Ingall in any department of the trade of an ironfounder shall be deemed a resumption of work for the purposes of this agreement And that in case the said sum of 100*l.* sterling shall not be repaid to the said society by the said Henry Ingall . . . . within one month after his resuming work as aforesaid it shall be lawful for the said"—parties of the second part—"or for either of them . . . . to sue and proceed against the said Henry Ingall . . . . upon this agreement in any Court of competent jurisdiction for the said sum of 100*l.* sterling or for so much thereof as may remain unpaid for the time being as for money had and received to the use of the plaintiffs or plaintiff And that it shall be no answer to any such proceeding that the said sum of 100*l.* sterling was partnership money or that the rules of the said society were in restraint of trade And the said Henry Ingall shall not demur to deny or put in question the right of the plaintiffs or plaintiff to sue for and recover the said sum of 100*l.* sterling And that for the purpose of any such proceedings it shall not be necessary to prove the said rules or the appointment of the plaintiffs or plaintiff or either of them or of the persons or person through whom they or either of them claim or

claims title as president or corresponding secretary of the said society respectively except by the production of the minute book of the said society In witness &c."

An unexpected improvement took place in the condition of the defendant, and in March, 1910, he was able to resume work in a foundry, not as a moulder, but as a core maker, at lower wages.

This action was thereupon brought in the Sheffield County Court by the president and secretary for the time being and the late president of the society suing on behalf of themselves and all other the members of the society. The claim was for 100*l.* payable by the defendant under the terms of the agreement of August 29, 1907.

The defendant contended that he had not resumed work as an ironfounder within the meaning of the agreement. He further contended that the agreement could not be enforced in a court of law on the ground that it was, within the meaning of s. 4 of the Trade Union Act, 1871 (1)—first, an agreement between members of a trade union as such, concerning the conditions on which a member should be employed; secondly, an agreement for the payment of a penalty to a trade union; and, thirdly, an agreement for the application of the funds of a trade union to provide a benefit to a member.

The county court judge held that the defendant had resumed work as an ironfounder within the meaning of the agreement. He then reviewed the rules of the society and came to the conclusion that they constituted the society an unlawful association

(1) The Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4:—

"Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely,

"1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed:

"2. Any agreement for the payment by any person of any subscription or penalty to a trade union:

"3. Any agreement for the application of the funds of a trade union,—

"(*a*) To provide benefits to members; . . . .

"But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

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at common law (1), and consequently that if the agreement came within s. 4 of the Trade Union Act, 1871, the action was not maintainable. As to the effect of that enactment, he held that the agreement was not one concerning the conditions on which a member should be employed, but that it was an agreement for the payment of a penalty, and also that it was an agreement for the application of the funds of a trade union to provide a benefit to a member.

He therefore gave judgment for the defendant.

The plaintiffs appealed.

*Danckwerts*, K.C., and *Waddy*, for the appellants. This contract is enforceable unless it falls within one or another of the first three sub-sections of s. 4 of the Trade Union Act, 1871. The county court judge has rightly held that it is not within sub-s. 1. An agreement whereby a member receives a sum of money and agrees to repay it in a certain event cannot be said to be an agreement concerning the conditions on which he shall be employed.

Neither is it an agreement for the payment of a penalty. A promise by a member to repay without interest a sum of money on the happening of an event, which shews that he was never entitled to have the money in the first instance, is merely equivalent to a promise to repay a loan. That cannot be called an agreement for the payment of a penalty.

Thirdly, it is not an agreement for the application of the funds of a trade union to provide a benefit to a member. To hold that it is so is to confuse the agreement of August 29, 1907, with the agreement contained in rule 25 of the rules of the society. The two are quite separate and distinct. The agreement of August 29, 1907, constitutes the performance and not the obligation of the agreement contained in rule 25. The agreement is analogous to a lease made under a building contract, by which a building owner agrees to grant a lease to the builder when the house shall have reached a certain stage. When the lease is granted the building contract is pro

(1) Apparently as being within the principle of *Russell* v. *Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506.

tanto executed, and the further rights of the parties are regulated, not by the contract, but by the lease. So in the present case the rights of the appellants and the respondent are regulated, not by rule 25, but by the agreement of August 29.

*Spencer Bower*, K.C., and *Arthur Page*, for the respondent. This is an agreement that if the respondent resumes work he will pay a sum of 100*l.*; it is therefore an agreement concerning the conditions on which he shall be employed within the meaning of s. 4, sub-s. 1, of the Act of 1871, and consequently it is not enforceable.

Secondly, the county court judge was right in holding that it was an agreement for the payment of a penalty within s. 4, sub-s. 2. The respondent has to pay the same sum of 100*l.* if he returns to work within a month or within a year or any number of years after receiving the advance. Such an agreement is penal in its character in that the same sum may be exacted in very different circumstances. It may be much harder for the man to refund the money after a long period of years when it will in all probability have been spent. But even if this contention fails there remains the point that a penalty within this sub-section need not be the same as a penalty within the rules of equity relating to penalties as opposed to liquidated damages. The sub-section was meant to cover every kind of payment that might be made by a member to the society.

Thirdly, there is no substance in the argument that the agreement of August 29 is separate and distinct from rule 25. The respondent received the 100*l.* under sub-rule 1, and the agreement merely states in other words the terms of sub-rule 6. The appellants sue on behalf of the society; the transaction is one entire transaction whereby the society pay 100*l.* and the respondent agrees to repay it; and it derives its whole being from rule 25. That rule constitutes an agreement for the application of the funds of a trade union to provide a benefit to a member. By s. 4, sub-s. 3, of the Act of 1871 such an agreement cannot be enforced directly or indirectly in any Court.

Counsel was not called upon in reply.

PHILLIMORE J. This action was brought by certain persons on behalf of themselves and other the members of a friendly

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society against a member or former member of that society upon the terms of an agreement dated August 29, 1907. The defendant had apparently been incapacitated for life from following his employment as an ironfounder. On being incapacitated he was entitled under one of the rules of the society to receive 100*l.* upon his signing an agreement whereby he acknowledged the receipt of that sum, and promised to repay it if he should thereafter resume work at his trade. The agreement is illogically expressed in that the terms on which the man receives the money preclude the event upon which he is to repay it, or the happening of that event shews that he was never entitled to receive it. But the intention is clear; he received the 100*l.* in the belief that he was incapacitated for life, and undertook to repay it in the improbable, but not impossible, event of his returning to work at his trade.

A defence was raised before the county court judge that the defendant had not returned to his trade because he had not returned to that department of his trade in which he was formerly engaged. Upon this defence the county court judge found against the defendant. Thereupon other defences were set up—namely, first, that apart from the provisions of the Trade Union Act, 1871, this agreement could not be sued upon because the plaintiffs were suing on behalf of a society which at common law and apart from that Act was an unlawful association; and, secondly, that, being forced to rely on the Trade Union Act, 1871, they were seeking to enforce or recover damages for the breach of one of those agreements which the Act says (s. 4) no Court shall enforce.

The first matter which the county court judge had to determine was whether this society was an unlawful association at common law so that it had to rely on the Act of 1871 in order to enforce this contract; and he came to the conclusion that it was. This appeal is from the whole of his judgment, but, inasmuch as it might become unnecessary to consider this point, the appellants' counsel did not address us upon it, and we have heard no argument on it. For the purposes of my judgment I assume that the county court judge was right upon the point, and I desire to say no more upon it. Assuming, then, that this society

is one which is only legalized by the Trade Union Act, 1871, is this agreement one of those which cannot be enforced under s. 4? If it is not such an agreement it can be enforced although the society in order to enforce it is obliged to rely on the Act.

Three points were taken before the county court judge. It was said that this agreement comes within s. 4, sub-s. 1, of the Act, which applies to any agreement between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed. It was further said that it came within sub-s. 2, which relates to any agreement for the payment by any person of any subscription or penalty to a trade union; and, lastly, that it came within sub-s. 3 (*a*), which deals with any agreement for the application of the funds of a trade union to provide benefits to members.

Upon the first point the judge held in favour of the trade union. He said: "I hold that it is not an agreement as to conditions of employment. I think that class contemplates contracts made with the employer which are not in accordance with the member's agreement with his union, and which by his entering into them might make him liable to an action by the society." I adopt the learned judge's reason, but I think I will add to it or amplify it by a few words of my own. It seems to me that the agreements contemplated by that sub-section are agreements between members of a trade union as to the conditions of employment, and not as to whether a member shall or shall not be employed. That is to say, the conditions referred to in the sub-section are conditions of employment in regard to such things as wages, hours, and bonds or arrangements between the employer and employee. They are not conditions upon which a man shall seek employment or return to his trade, but are the conditions of his employment when he is actually employed.

The second point raised is as to whether this constitutes an agreement for the payment of a penalty. Under rule 25 a member who has been sufficiently long in benefit to be entitled to claim, and who by an accident is incapacitated for life from following his employment as an ironfounder, is entitled to the sum of 100*l*. Sub-rule 6 provides that members receiving this

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allowance shall sign an agreement whereby, if they resume their occupation as ironfounders, they shall in that case refund to the society the whole amount received. The agreement sued upon in the present case is that contemplated by sub-rule 6, which was signed by the defendant in accordance with that sub-rule. The agreement expresses that which the sub-rule requires, namely, that in the event of the defendant returning to his trade he will refund the sum of 100*l.* received by him. Why is that a penalty? A man has contracted to receive from the insuring body a conditional payment, and he receives that conditional payment upon the terms that it is to be repaid by him in one particular event, namely, if he returns to his trade. That seems to me to be in no sense of the word a penalty at common law, and not being a penalty at common law I do not think it can be a penalty under s. 4 of the Trade Union Act, 1871. It is possible that s. 4 may not comprise all things which could be called penalties at common law, and probable that it is confined to matters such as fines or exclusion from the trade union or from benefit; but I am clear that the section does not extend the meaning of the word "penalty."

Then comes the third point, a more difficult one, namely, whether this is an agreement for the application of the funds of a trade union to provide benefits to members. It is said that this return of the 100*l.* is but a part of one transaction, and so it is. But if two people agree that in certain events one shall execute an instrument which will establish certain contractual relations, the original agreement is exhausted when the further instrument is executed, and the right to sue on the contractual relation established by the further instrument exists quite independently of the original agreement which related to the instrument being executed.

It may be that there is in these rules an agreement for the application of the funds of the trade union to provide benefits to members, and the defendant could not have enforced the payment of this 100*l.* because such an agreement would be struck at by s. 4, sub-s. 3 (*a*). But if so, the benefit which the defendant has agreed to get and the trade union has agreed to give him and which cannot be enforced by action is a conditional gift of 100*l.*, and the agreement for the application

of the funds of the trade union has been performed when that conditional gift has been made and the necessary instrument for establishing that conditional gift has been executed. After that any rights which arise under that instrument are not rights which are to be enforced as part of the agreement for the application of the funds of the trade union. If, for instance, instead of being a gift of 100*l.* it had been a loan of 100*l.* for so long as the man paid a very small rate of interest, with a covenant by the man to repay, or a loan upon mortgage on his entering into the ordinary covenant in a mortgage, the enforcing of the contract to pay interest, or of the covenant in the mortgage deed, would not be enforcing an agreement for the application of the funds of a trade union. Those funds were applied when the sum of 100*l.* was handed over to the defendant upon certain terms; but the enforcing of those terms is quite another matter. Therefore I think the county court judge was wrong upon the second and third points upon which he has decided. That being so, this action was maintainable; the appeal must be allowed, and judgment entered for the plaintiffs for 100*l.*

BANKES J. I agree. This is a case in which the defendant put his hand to a document described as a memorandum of agreement and dated August 29, 1907, under which he agreed in certain events to repay the sum of 100*l.* which he had received from the society of which he was a member. The society, thinking that these events had occurred, brought an action against him in the county court. The defendant took certain points in the county court, some of which the judge decided in his favour. One question which might arise has not been argued before us, namely, whether the society is, apart from the Trade Union Acts, an illegal society; and the point not having been argued, I say nothing about it.

The other points all arise with reference to the proper construction of s. 4 of the Trade Union Act, 1871. It was contended on the part of the defendant that the society had no right of action against him in respect of this sum of 100*l.*, because the document which he had signed came for three reasons, or some or one of them, within s. 4 of the Act.

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The grounds were, first, that the agreement was a condition of employment; secondly, that the agreement was for the payment of a penalty to the trade union. On those two points I desire to add nothing to what has been said by my brother Phillimore. Those two points appear to me to be clear. The third point, however, that the agreement was one for the application of the funds of a trade union to provide a benefit to a member, seems to me to be one of greater difficulty. It is plain that the rules constitute an agreement between the society and its members upon the various matters dealt with thereby, and that among these matters are benefits to which members are entitled. It is clear that s. 4, sub-s. 3, of the Act of 1871 applies to all agreements between the society and its members with regard to benefits to which the members are entitled under the rules, because these agreements are clearly agreements for the application of the funds of the trade union to provide benefits to its members. The present case raises a question as to the construction of rule 25, sub-rules 1 and 6. The agreement constituted by the rules is a promise that the society on its part will in certain events grant a conditional benefit to a member who brings himself within sub-rule 1 of rule 25, and a promise by the member on his part that he will, as a condition of receiving the benefit, enter into an agreement to repay the benefit in certain events. Now in so far as those two sub-rules constitute an agreement between the society and the member I think that the agreement, being one for the application of the funds of a trade union to provide a benefit to its member, could not be sued upon. But that is not the question here. The question we have to decide is whether the agreement, which the member has, in pursuance of his promise contained in sub-rule 6, entered into, is a separate and independent agreement, or whether it is merely a part or a term of the original agreement contained in rule 25, in which case it could not be enforced in a Court of law. In my opinion it is a separate and distinct agreement, the result and not a part of the original agreement. That being so I am at liberty to construe the document of August, 1907, as a separate agreement, and doing so I come to the conclusion that this is not an agreement for the application of the

funds of a trade union to provide a benefit to a member, and consequently that there is nothing to prevent it from being enforceable in a Court of law.

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*Appeal allowed.*

Solicitors for plaintiffs: *Arthur Neal & Co., Sheffield.*

Solicitors for defendant: *Maude & Tunnicliffe, for Simpson & Meakin, Derby.*

W. H. G.

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*Considered.* *In re* GROSVENOR METAL CO. LD. [1950] 1 Ch. 63

[IN THE COURT OF APPEAL.]

C. A. 1911 *April 8.*

## ARMORDUCT MANUFACTURING COMPANY, LIMITED *v.* GENERAL INCANDESCENT COMPANY, LIMITED.

*Company—Voluntary Liquidation—Judgment Debt—Execution—Postponement obtained by Trickery—Leave to proceed with Execution—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 140.

The plaintiffs obtained judgment against the defendant company on February 24, 1911, and their solicitor applied on February 25 to the company's solicitor to obtain and send to him the company's cheque in payment of the judgment debt. The plaintiffs' solicitor was led to believe by the solicitor and by a director of the company that a cheque would be sent in a few days, and in consequence he delayed issuing execution, but he was not told, and did not know, that on February 25 a notice had been sent out convening a meeting of the company for March 6 for the purpose of passing a resolution for the voluntary liquidation of the company on the ground that the company was unable to pay its debts. The meeting was held on March 6 and the resolution for voluntary liquidation was passed. On the same day the judgment debt not having been paid, the plaintiffs issued execution:—

*Held*, that the postponement of execution had been caused by a trick on the part of the defendant company, and that the plaintiffs, therefore, ought not to be prevented from proceeding with their execution.

*In re Vron Colliery Co.*, (1882) 20 Ch. D. 442, distinguished.

APPEAL from an order of Bucknill J. at chambers.

In an action between the plaintiffs and the defendant company a verdict was given for the plaintiffs. The Court of Appeal ordered a new trial, the costs of the first trial to abide the result of the second trial. At the second trial a verdict was also given for the plaintiffs, and judgment was given on February 24, 1911,

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for the plaintiffs for a sum of money to be ascertained, and for 259*l.*, the taxed costs of the first trial, to be paid forthwith.

On February 25 the plaintiffs' solicitor wrote to Mr. Jonathan Edward Harris, a solicitor then acting for the defendant company, asking him to procure and send a cheque for the 259*l.* On February 27 Mr. Harris acknowledged the letter and said he was communicating with his clients. On February 28 the plaintiffs' solicitor wrote to Mr. Harris that the cheque must be received in the course of the following day. On March 1 a conversation took place on the telephone between the managing clerk to the plaintiffs' solicitor and Mr. Harris. According to the former, Mr. Harris said that a cheque for 259*l.* would be sent, but that it was being delayed as the signature of another director was required; according to Mr. Harris, he said that he had not been able to obtain a cheque and that he understood there was some difficulty in procuring a cheque until the arrival of a gentleman who was then, as Mr. Harris was informed, on his way from Germany. On March 3 the plaintiffs' solicitor spoke to Mr. Harris on the telephone, who said he was seeing his clients that afternoon. On Saturday, March 4, Mr. Harris sent to the plaintiffs' solicitor the original of a letter dated March 3, signed by a Mr. Moor, a director of the defendant company, and addressed to Mr. Harris, which was as follows: "Re Armorduct Company's costs. We regret that we are unable to send you the cheque for which you asked to-day, but we will endeavour to do so if possible to-morrow or Monday." On March 4 the plaintiffs' solicitor wrote to Mr. Harris that unless he received payment of the costs by 12 o'clock on Monday, March 6, he was instructed to proceed to recover them. The costs were not paid on March 6, and at 3.30 P.M. on that day a writ of fi. fa. was issued. On March 7 the sheriff entered into possession of the premises of the defendant company. The goods seized were immediately claimed by a Mr. Reid as liquidator of the defendant company. It appeared that on February 25 a notice had been sent out to the shareholders of the defendant company convening a meeting for March 6, on which day at 10 A.M. the meeting was held, and a resolution was passed that the defendant company should go into voluntary liquidation on the ground that the company could not

meet its liabilities, and Mr. Reid was appointed liquidator. The sheriff took out an interpleader summons in which the liquidator was claimant. On March 9, on an ex parte application in chambers by the liquidator, Lawrance J. ordered the sheriff to withdraw from possession and stayed the interpleader proceedings.

On March 10 the plaintiffs took out a summons for an order that the order of Lawrance J. be set aside or varied by directing an issue to be tried between the plaintiffs and the liquidator as claimant on the interpleader summons.

On the hearing of this summons Bucknill J. made an order that the sheriff do withdraw from possession of the goods seized by him under the writ of fi. fa. and claimed by the liquidator.

The plaintiffs appealed against this order. (1)

*Sanderson*, K.C., and *Henn Collins*, for the plaintiffs. The only inference that can be drawn from the facts is that the plaintiffs were induced by promises of payment, which the defendant company had no intention of fulfilling, to postpone issuing execution until after the resolution for the voluntary winding up of the company had been passed. In these circumstances the Court, in its discretion, will not prevent the plaintiffs from proceeding with the execution. *In re London Cotton Co.* (2); *Ex parte Railway Steel and Plant Co.* (3); *In re Richards* (4); *In re Withernsea Brickworks* (5); *In re Vron Colliery Co.* (6) [They referred to the Companies (Consolidation) Act, 1908, ss. 140, 186, 193, 211.]

*Clauson*, K.C., and *R. W. Turner*, for the defendant company. A mere representation by a debtor to a creditor that he will be paid, if time is given, is no ground for assisting that particular creditor at the expense of the other creditors: *In re Vron*

(1) On the appeal being opened, counsel for the defendants stated that although in his opinion it was doubtful whether the appeal related to a question of practice or procedure, he consented on behalf of the defendants to the appeal being heard by the Court of Appeal.

(2) (1866) L. R. 2 Eq. 53.
(3) (1878) 8 Ch. D. 183.
(4) (1879) 11 Ch. D. 676.
(5) (1880) 16 Ch. D. 337.
(6) 20 Ch. D. 442.

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*Colliery Co.* (1) In that case the Court of Appeal doubted whether *Ex parte Railway Steel and Plant Co.* (2) and *In re Richards* (3) were rightly decided; in the latter case a creditor had been induced to delay his proceedings by false pretences.

[KENNEDY L.J. In Buckley on Companies, 9th ed. at p. 332, it is stated :—"*Quære*, whether indulgence given at the request of the company, or delay caused by the company vexatiously, or even by false pretence, is any ground for giving leave to proceed with an execution."]

The persons who will really be affected by the execution, if it is permitted, are the other creditors of the company, and it is not right that they should be prejudiced by acts of the directors for which they are not responsible.

FARWELL L.J. In my opinion this appeal succeeds. The facts of the case are, I hope, unusual. The plaintiffs recovered judgment against the defendant company for a sum of 259*l*., and on February 25 the plaintiffs' solicitor wrote to a Mr. Harris, a solicitor who was at that time acting for the defendant company, asking him to send him his clients' cheque for that sum. On the same day, unknown to the plaintiffs' solicitor, a notice was sent out convening a meeting of the defendant company for March 6, at which a resolution was to be proposed that the company should be voluntarily wound up on the ground that it was unable to pay its debts. The letter of February 25 was acknowledged by Mr. Harris on February 27, and at that time Mr. Harris must have known of the intended liquidation of the company. On March 1 a conversation took place on the telephone between Mr. Harris and the managing clerk of the plaintiffs' solicitor, in the course of which, according to Mr. Harris, he stated that the only obstacle to the sending of the cheque was the absence abroad of one of the directors of the company. On March 4 the plaintiffs' solicitor received a letter from Mr. Harris enclosing an original letter which Mr. Harris had received from a Mr. Moor, a director of the company. It is, I may observe, a very unusual thing

(1) 20 Ch. D. 442. (2) 8 Ch. D. 183.
(3) 11 Ch. D. 676.

for a solicitor to send an original letter of his own clients to their opponents. The letter was dated March 3 and was as follows: "We regret that we are unable to send you the cheque for which you asked to-day, but we will endeavour to do so if possible to-morrow or Monday." Further communications were made by the plaintiffs' solicitor by letter and telephone, and finally, no cheque having been received, on March 6 a writ of fi. fa. was issued and the sheriff's officer entered on March 7. Meanwhile at 10 A.M. on March 6 the meeting of the company had been held and a resolution for a voluntary winding-up had been passed.

On a mere statement of these facts, and in the absence of any denial by Mr. Harris that he knew of the pending liquidation of the company, it is impossible to refrain from coming to the conclusion that a series of tricks was practised with the object of preventing the issue of execution until after the passing of the resolution to wind up the company. The question is whether in these circumstances the Court, in the exercise of that discretion which it undoubtedly has, should permit the plaintiffs to obtain the benefit of the judgment by means of execution. I am not aware of any case in which it has been suggested that if the creditor has been prevented by force, as in *In re London Cotton Co.* (1), or by fraud or trickery, from issuing execution, the Court will not exercise its discretion in favour of the creditor. It is said that the persons who really will be affected by the execution are the other creditors of the company. That is true, but the rights of the other creditors were before the liquidation subject to the legal right of the plaintiffs to issue execution on their judgment. They were prevented from doing so by the trickery of the company, and the other creditors are not entitled to take advantage of that wrongful act and thereby become participators therein. The creditors cannot set up any right as third parties to take advantage of the trick of the company. It is said that the decision in *In re Vron Colliery Co.* (2) shews that in the circumstances of this case the plaintiffs ought not to be allowed to proceed with their execution. In my opinion the decision in *In re Vron Colliery Co.* (2) has nothing

(1) L. R. 2 Eq. 53. (2) 20 Ch. D. 442.

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whatever to do with a case like the present, for the facts there were entirely different. It is true that in the judgments in the Court of Appeal some doubts were thrown on earlier decisions by Courts of first instance in which it had been held that a mere persuasion to give time was a reason for preferring the creditor, and Jessel M.R. doubted whether those earlier decisions were rightly decided. It is not necessary for us to express any opinion as to the views of Jessel M.R. or of the other members of the Court (which were merely obiter dicta) with regard to those earlier cases, for the present case is not a case of fair persuasion or bargain to give time, but is a case of barefaced trickery, and the decision in *In re Vron Colliery Co.* (1) does not touch a case of this description. For these reasons I am of opinion that the appeal should be allowed.

KENNEDY L.J. I agree and I entirely concur with the reasons given by Farwell L.J. in his judgment.

*Appeal allowed.*

Solicitor for plaintiffs: *J. T. Goddard.*
Solicitors for defendants: *Marston & Robinson.*

(1) 20 Ch. D. 442.

F. O. R.

[IN THE COURT OF APPEAL.]

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*Feb.* 1, 2;
*March* 9.

## DAWSON & CO. *v.* BINGLEY URBAN DISTRICT COUNCIL.

*Local Government — Fire-Plug — Misleading Indication Plate — Delay in extinguishing Fire—Liability of Local Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 66.

By s. 66 of the Public Health Act, 1875, every urban authority is required to cause fire-plugs to be provided and maintained, and to "paint or mark on the buildings and walls within the streets, words or marks near to such fire-plugs to denote the situation thereof."

The defendants, a local authority, affixed to a wall in a street which was not repairable by the inhabitants at large a plate intended to indicate the position of a fire-plug in the water main and marked "F. P. 22 ft. 3 in."; in fact, a line drawn straight from the plate across the street for the required distance crossed the water main at a spot 6 feet 10 inches away from the place where the fire-plug was inserted in the main. A fire broke out on the plaintiffs' premises, which were a short distance from the plug; the fire brigade were quickly in attendance, but there was considerable delay owing to their inability to find the exact position of the fire-plug, as a result of which delay the fire assumed greater dimensions and caused more damage than it would otherwise have done:—

*Held*, that, in putting up an indication plate which was in fact misleading, the defendants were guilty of an act of misfeasance, and not of non-feasance only, and that they were therefore liable to the plaintiffs for the extra loss caused by the fire as damages for breach of their statutory duty.

Appeal of the plaintiffs from the judgment of Grantham J. after trial with a special jury at Leeds.

The action was brought to recover damages from the defendants for a breach of duty under s. 66 of the Public Health Act, 1875, in the maintaining of a fire-plug and in incorrectly denoting its position, whereby the operations of the fire brigade were so delayed as to greatly aggravate the effects of a fire which had broken out on the plaintiffs' premises. By that section, "Every urban authority shall cause fire-plugs and all necessary works, machinery, and assistance for securing an efficient supply of water in case of fire to be provided and maintained, and for this purpose they may enter into any agreement with any water company or person; and they shall paint or mark on the

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buildings and walls within the streets, words or marks near to such fire-plugs to denote the situation thereof, and do such other things for the purposes aforesaid as they may deem expedient."

The defendants, as urban authority, had caused a fire-plug to be placed in a street or road at a short distance from the factory of the plaintiffs; the road was not in fact under the control of the defendants, not being repairable by the inhabitants at large. The defendants also caused an indication plate, bearing the words "F. P. 22 ft. 3 in.," to be placed on a wall in the road; the plate was so placed that, if a straight line were drawn from the indication plate to the water main in the middle of the road, it would fail to denote the position of the fire-plug, which was inserted in the main at a spot distant 6 feet 10 inches from the place indicated by such a straight line. On the afternoon of January 20, 1909, a fire broke out on the plaintiffs' premises; it started in the drying house and spread successively to the dyeing and pulling houses. At this time the part of the road in which the fire-plug was placed was covered with dirt and ashes to a depth of about six inches. The fire brigade arrived quickly, but there was considerable delay in getting to work owing to its taking about a quarter of an hour to find the plug; the result being that the damage caused by the fire was thereby increased to an amount, as found by the jury, of 512*l*. This amount the plaintiffs sought to recover in the present action. A claim based on an alleged breach of the duty of the defendants to repair a street repairable by the inhabitants at large was, in view of the facts, abandoned by the plaintiffs, who ultimately based their case upon allegations of negligence and misfeasance in the performance of their duty under s. 66 of the Public Health Act, 1875, by burying the fire-plug beneath the dirt and ashes and not keeping it level with the surface of the road, and, secondly, by affixing an indication plate which was misleading and did not really denote the position of the fire-plug, causing delay aggravating the damage.

The following were the questions left to the jury and their answers thereto :—

(1.) Was there negligence in defendants not keeping the plug level with the surface of the road ?—Yes.

(2.) Was there negligence in not indicating on the plug plate the position of the plug?—Yes.

(3.) Did the defendants bring to and place ashes or other material on the road so as to cover up the fire-plug?—There is no evidence that the defendants covered up the plug.

(4.) Did the delay in finding plug A allow the fire to make headway to a greater extent than it would have done if the hose could have been attached to plug A on the arrival of the reel cart?—Yes.

(5.) Could the fire have been kept to the drying house if hose had been attached to plug A at once?—No.

(6.) If the fire could not have been kept to the drying house, could it have been kept to the drying and dyeing houses?—Yes.

(7.) If kept to those two houses, would it have been kept in so as to save the loss of the pulling house?—Yes.

(8.) If it could not have been kept in so as to save the whole loss of the pulling house, could it have been kept in so as to save some loss to the property?—No. 8 is answered by No. 7.

(9.) If so, how much?—512*l.*

Upon these findings the learned judge gave judgment for the defendants. The plaintiffs appealed.

*Waugh*, K.C., and *Richard Watson*, for the plaintiffs. Upon the findings of the jury the plaintiffs are entitled to judgment. It is admitted that where a statute creates a duty upon the part of a public body towards the public, an individual cannot maintain an action for damage for a neglect to perform that duty, that is, for mere non-feasance, unless perhaps in cases where the statute creates a special duty towards that individual: *Cowley* v. *Newmarket Local Board* (1); *Robinson* v. *Workington Corporation* (2); *Glossop* v. *Heston and Isleworth Local Board*. (3) But these authorities are inapplicable to the present case, for there is here a distinct finding of the jury that the defendants were guilty of negligence in not indicating on the plate the proper position of the plug. That finding is not one of non-feasance only, but of actual misfeasance on the part of the defendants. The notice on the

(1) [1892] A. C. 345. (2) [1897] 1 Q. B. 619.
(3) (1879) 12 Ch. D. 102.

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indication plate was actively misleading; it not only failed to indicate the true position, but directed persons to a spot where there was no plug at all. It is no answer to say that in the daytime and in ordinary circumstances the want of a proper direction plate would not have mattered; it is to provide for fires breaking out on a dark night or in an unusual state of things, such as a heavy fall of snow concealing the plug from sight, that the indication plate is necessary. There has been clear misfeasance by the defendants in carrying out their statutory duty, and no special remedy being given by statute, this action will lie: see judgment of Lord Esher M.R. in *Robinson* v. *Workington Corporation*. (1)

*Tindal Atkinson*, *K.C.*, and *Joshua Scholefield*, for the defendants. The defendants are not liable. Even on the assumption that something wrong was done or allowed, the defendants are under no statutory obligation to supply a fire engine; under s. 32 of the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), which is incorporated by s. 171 of the Public Health Act, 1875, they have power to supply fire engines, but that power is permissive only and not compulsory; they were therefore mere volunteers, and the damages did not flow from any breach of duty.

[VAUGHAN WILLIAMS L.J. Having regard to the answer of the jury to the second question, the liability of the local authority to supply an engine is immaterial, and the case cannot be distinguished from one where the fire brigade is not supplied by the local authority.]

The damages do not flow naturally from the breach of any statutory obligation. Sect. 66 of the Public Health Act, 1875, does not require that the plate should indicate the position of the fire-plug with absolute accuracy; it is sufficient if it denotes or points towards the spot so as to enable it to be quickly found in ordinary circumstances. It is not because the inscription on the plate misleads that the placing of it in its position is an act of misfeasance; mere negligence or omission may be just as misleading as an act of commission. All that the defendants have done is to put up a plate in such a manner as not to denote

(1) [1897] 1 Q. B. 619, at p. 621.

the position of the plug, which was an act of omission or non-feasance only, for which no action will lie. Further, the jury were not asked whether, or to what extent, the damages were caused by the inaccurate indication plate as distinguished from those caused by the covering up of the fire-plug, for which the defendants are clearly, on the findings of the jury, not responsible.

*Waugh, K.C.*, in reply.

*Cur. adv. vult.*

March 9. VAUGHAN WILLIAMS L.J. read the following judgment:—Lord Halsbury in the case of *Shoreditch Corporation* v. *Bull* (1) says: "I am desirous of not going beyond the facts and findings in this case for more reasons than one, and among them, conspicuously, is the reason that I think that some propositions in respect to the non-liability of the surveyor, or the local board now representing the surveyor, of highways may be pressed too far. At the same time I wish to express no difference of view from that which has been expressed before in this House. When the question is raised in a direct form it may be worth while to consider whether or not that which has been described as an act of non-feasance in several of the cases in which that proposition has been applied, I think a little too widely, may not be considered misfeasance; but it is enough for the present case to say that according to the authorities there is enough here to shew that the act which has been done was an alteration of the normal condition of the road, and if there was anything wrong either in the mode of carrying out the work or in the period of time which was allowed to elapse between the opening of the road and its becoming firm, or if in any other way the thing that was being done was negligently done, or if there was evidence for the jury that it was negligently done within any of the decisions which have been cited to us, it was an act of misfeasance for which the local or road authority under whose authority the thing was done was responsible." Lord Macnaghten and Lord Lindley concurred in this judgment and its reasoning.

I gather from this extract from the judgment of Lord Halsbury

(1) (1904) 90 L. T. 210.

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that, although well-established authorities make it clear that public bodies representing the public are not liable to be sued by an individual member of the public who has sustained injury in consequence of the omission of such a body to perform a statutory duty created for the benefit of a class of which such person is one, yet the public body will be liable if by its acts it alters the normal condition of something which it has a statutory duty to provide or maintain and in consequence some person of a class for whose benefit the statutory duty is imposed is injured. The reason why the public body is liable in such a case is that it is not mere non-feasance but misfeasance of the public body which has caused the injury ; and I think, although it is not necessary to decide it in the present case, mere negligence by the public body in the course of the performance of its duty may constitute misfeasance if the result of negligent doing of the statutory duty makes that which the statute requires to be provided dangerous for those for whose benefit such statutory duty is imposed. I will now try to apply the principles which I think are to be deduced from the case of *Shoreditch Corporation* v. *Bull* (1), as decided in the House of Lords, to the present case.

The plaintiffs allege that the defendants, as urban authority, had the duty to level, pave, metal, flag, channel, alter, and repair a street within the urban district which, being repairable by the inhabitants at large, was vested in, and under the control of, the defendants, and in fact had been repaired by them. It is admitted that this part of the claim cannot be supported, since the road was not in fact under the control of the defendants, or repairable by the inhabitants at large. Secondly, the plaintiffs complain that, in accordance with s. 66 of the Public Health Act, 1875, it became and was the duty of the defendants to cause fire-plugs and all necessary works, machinery, and assistance for securing a sufficient supply of water in case of fire to be provided and maintained in the said street, and also to paint or mark on buildings and walls within the said street words or marks near to such fire-plugs to denote the situation thereof and to do all such other things for the said purposes as might be expedient. The plaintiffs go on to allege that the defendants were guilty of

(1) 90 L. T. 210.

negligence and misfeasance in the performance of their said duty and/or carrying out repairs in the said street, and that in the course of the repair of the said street they buried to a depth of about six inches a fire-plug situate at a distance of about sixteen yards from the nearest point of the plaintiffs' premises in a north-easterly direction. It is also alleged that the defendants were guilty of negligence and misfeasance in the performance of their said duty under s. 66 of the Public Health Act, 1875, and in particular it is alleged that the plate mark, which should have denoted the situation of the plug, was misleading and did not really denote the position of the plug, and that the operations of the fire brigade to extinguish a fire which had broken out in the factory of the plaintiffs were thereby delayed fifteen to twenty minutes in finding the plug, and that the said delay enabled the fire to develop to such an extent that the damage was largely occasioned and/or increased thereby.

The questions put to the jury and the answers thereto were as follows. [His Lordship read the questions as already set out, and continued:—] On these answers I think that the case for misfeasance depends entirely on the misleading notice on the plate which should have indicated the position of the plug; for I think that the answers to questions 1 and 3 indicate non-feasance rather than misfeasance, but I am clear that on the evidence the answer to question 2 is a finding of misfeasance.

The only observation which I wish to add is that in my opinion the observations of James L.J. in *Glossop* v. *Heston and Isleworth Local Board* (1), cited by Lord Herschell in *Cowley* v. *Newmarket Local Board* (2), do not affect the law in this case. The learned Lord Justice says in the cited passage: "It appears to me that if this action could be sustained, it would be a very serious matter indeed for every ratepayer in England in any district in which there is any local authority upon which duties are cast for the benefit of the locality. If this action could be maintained, I do not see why it could not in a similar manner be maintained by every owner of land in that district who could allege that if there had been a proper system of sewage his property would be very much improved." The case in which

(1) 12 Ch. D. 102, 109. (2) [1892] A. C. at p. 352.

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this remark was made was a case of non-feasance, and the present case is a case of misfeasance; the reasoning, however might be applied to misfeasance. The observations of the Lord Justice may lead the Legislature to change the law and adopt a system of fines for misfeasance, but as the law stands I have no doubt actions lie for misfeasance by public bodies, and that the verdict of the jury must stand and the judgment of the learned judge be reversed.

FARWELL L.J. read the following judgment:—The defendants are bound by s. 66 of the Public Health Act, 1875, to cause fire-plugs to be provided and maintained, "and they shall paint or mark on the buildings and walls within the streets words or marks near to such fire-plugs to denote"—i.e., so as to denote—"the situation thereof." The object of this enactment is to ensure that the position of the fire-plugs shall be easily and correctly ascertained, although the plug itself may be difficult to see by reason of snow or mud or the like covering it up. In the present case a fire broke out and the fire brigade turned out at once and found the pointer to the fire-plug put up by the defendants; but the pointer was wrong and misdirected the searchers to the extent of 6 feet 10 inches. The result was that fifteen minutes were lost in finding the plug and a building was consumed that would otherwise have been saved. Notwithstanding the verdict of the jury to this effect, the learned judge has dismissed the action on the ground that the plaintiffs have no cause of action. I am unable to agree with him.

The breach of a statutory duty created for the benefit of an individual or a class is a tortious act, entitling any one who suffers special damage therefrom to recover such damages against the tortfeasor. Thus, in Com. Dig. Action upon Statute (F) it is stated (1): "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law," and several precedents of declarations in case on statutes will be found in Chitty's Pleadings, 6th ed., pp. 536 et seq.

(1) Com Dig. (5th ed.), p. 442.

The breach of the statute is sufficient cause of action, because the tortious act, being done in breach of the statute, becomes by legal intendment an act done with intent to cause wrongful injury, just as a false and libellous statement is by legal intendment made maliciously. The act done or omitted may, apart from the statute, be innocent, or its omission may be not actionable, but the enactment makes it actionable. For instance, a man who mero motu put up a signpost on his own land by four cross roads, but inadvertently put the arms wrong, would not be liable to any one misled: no action lies for an innocent misrepresentation: *Derry* v. *Peek* (1); but if he was under a statutory liability to put up and maintain a correct signpost and made a similar mistake he would be liable for breach of his statutory duty.

The generality of the foregoing observations must be restricted by omitting some cases at any rate of non-feasance of duties enacted for the benefit of a body of men, and I am not concerned to consider whether the learned judge would have been right if this had been (as he thought it) non-feasance and not misfeasance, because I am of opinion that this is misfeasance. The provision of a sign misdirecting inquirers may no doubt in a sense be said to be the non-provision of a correct sign, but it would certainly be wrong to read the commission of a wrong as the omission to do right in order to enable the defendants to escape liability: see Lord Halsbury's speech in *Shoreditch Corporation* v. *Bull.* (2) The observations of James L.J. in *Glossop* v. *Heston and Isleworth Local Board* (3) must be read with reference to the case before the Court, which was an application for a mandatory injunction to set up a scheme of drainage for a large district. If a man asks me the way to the Temple and I say nothing, I do not either direct or misdirect him; but if I direct him to Lincoln's Inn I misdirect him, although it may also be added that I fail to direct him to the Temple. I am therefore of opinion that this appeal should be allowed and judgment entered for the plaintiffs in accordance with the verdict for 512*l.*, with costs here and below.

(1) (1889) 14 App. Cas. 337. (2) 90 L. T. 210.
(3) 12 Ch. D. 102, 109.

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KENNEDY L.J. read the following judgment:—In this case the following facts appear upon the findings of the jury or have been proved by evidence adduced at the trial. (1.) The damage done by the fire was increased to the extent of 512*l.* by the delay of the fire brigade in finding plug A. (2.) This delay was due to two causes: (*a*) the fire-plug itself being covered up by two or more inches of dirt and ashes, (*b*) the misleading direction of the plate placed by the defendants at the side of the road to denote the position of the fire-plug—"F. P. 22 ft. 3 in." A straight line drawn from the plate to the water main in the road would fix the position of the fire-plug 6 feet 10 inches away from and, if I understand the plan, to the north-west of its real position. (3.) The defendants, in placing the plate with the misleading direction, committed a breach of the statutory duty imposed upon them as the urban authority by s. 66 of the Public Health Act, 1875, "to paint or mark on the buildings and walls within the said street words or marks near to such fire-plugs to denote the situation thereof"; and the jury have found expressly in their verdict that the defendants were guilty of negligence in not indicating on the plug plate the position of the plug. The jury also found that there was negligence on the part of the defendants in not keeping the plug itself level with the surface of the road; but, inasmuch as the road was not vested in the defendants and was not repairable by them, and (as the jury also expressly found) there was no evidence that the defendants had themselves placed upon the road the materials—dirt and ashes—which covered up the plug, the finding of the jury as to negligence of the defendants in not keeping the plug level with the surface of the road must, I think, be excluded from the consideration of the defendants' liability. At the same time, it is quite reasonable to hold that the defendants, when putting up the plate, ought to have borne in mind that, in the natural course of things, the fire-plug might become covered and hidden by snow or dirt, as in fact it did, and that, if that should happen, serious consequences might ensue, as they have ensued, if the denoting plate, instead of giving a true index to the hidden plug, gave untrue and misleading directions. The finding by the jury of negligence on the

part of the defendants in disobeying s. 66 was certainly justifiable.

Upon the facts and findings I have stated, it is contended on behalf of the defendants, and my brother Grantham at the trial has held, that no legal liability has been established. It is argued that the thing of which the plaintiffs complain—the placing of a plate with a misleading direction as to the situation of the fire-plug, contrary to the duty imposed by s. 66 to paint or mark it so as to denote its situation—ought to be treated as, or as equivalent to, a non-feasance, and therefore, say the defendants' counsel, not actionable. Now, the general law as to the remedy of a person who has been injured by the infringement of a statutory right or the breach of a statutory obligation for his benefit is clear. Where the statute has not in express terms given a remedy, the remedy which by law is properly applicable to the right or the obligation follows as an incident. The law is, I think, correctly stated in Addison on Torts, 8th ed., p. 104, referring to Comyn's Digest: "In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law: Com. Dig. Action upon Statute (F). Accordingly, where the statute is silent as to the remedy, the Legislature is to be taken as intending the ordinary result; and the proper remedy for breach of the statute is an action for damages and, in a proper case, for an injunction." In the present case the plaintiffs, who have been injured by the defendants' breach of the duty imposed upon them by the Public Health Act, 1875, s. 66, rely upon the general principle of law which is, as I have said, in my opinion correctly stated by Mr. Addison in the passage which I have just cited. The defendants, however, claim immunity upon the authority of the judgment of the Court of Appeal in *Atkinson* v. *Newcastle Waterworks Co.* (1), and of the decision of the House of Lords in *Cowley* v. *Newmarket Local Board*. (2) So far as regards the first and earlier of these two cases, it is to be noted that (*a*) the defendants there were not a public body but a private company, so that the Act,

(1) (1877) 2 Ex. D. 441. (2) [1892] A. C. 345.

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in the words of Lord Cairns, ought to be regarded "not as an Act of public and general policy but rather in the nature of a private legislative bargain with a body of undertakers," and both the Lord Chancellor and Cockburn C.J. lay stress upon this point; and (*b*) the Act in that case itself imposed remedies in the form of penalties, a circumstance upon which all the members of the Court of Appeal, questioning the judgment of the Queen's Bench in *Couch* v. *Steel* (1) largely based their conclusion. In the case before us, the Public Health Act, 1875, contains no specific provision for the recovery of penalties or for other remedy for the infringement of s. 66, and the defendants are not a private company or corporation, but a public authority invested by statute with powers and duties for the benefit of the inhabitants of the district in which that public authority exists.

*Cowley* v. *Newmarket Local Board* (2) was a decision of the House of Lords that a local board in respect of its duties in regard to highways under ss. 144 and 149 of the Public Health Act, 1875, is not legally liable for mere non-feasance, according to principles illustrated in old days by *Russell* v. *Men of Devon* (3), and in modern times by *Gibson* v. *Mayor of Preston* (4) and *Municipality of Pictou* v. *Geldert*. (5) That is all the case actually decided. Lord Herschell, it is true, does, in the earlier part of his judgment (6), express a serious doubt of the soundness of the general proposition that, wherever a statutory duty is created, any person who can shew that he has sustained injury from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed. He quotes with approval certain observations of James L.J. in *Glossop* v. *Heston and Isleworth Local Board* (7) on this point. But Lord Herschell does not found his decision upon this doubt. Like the other noble and learned Lords, he gives judgment for the defendants upon the narrower point of the non-liability of the local board for damage arising from mere omission to repair

(1) (1854) 3 E. & B. 402.
(2) [1892] A. C. 345.
(3) (1788) 2 T. R. 667.
(4) (1870) L. R. 5 Q. B. 218.
(5) [1893] A. C. 524.
(6) [1892] A. C. at p. 352.
(7) 12 Ch. D. 102, at p. 109.

a highway. "I think it," he concludes (1), "to say the least, doubtful whether, apart from the reasons to which I am about to refer, the contention that an action lies against the local board for a breach of their statutory duty to repair the highways can be maintained"; and he then proceeds to the discussion of the narrower question, and to give judgment upon that. In regard to the observations of James L.J. in *Glossop* v. *Heston and Isleworth Local Board* (2) it is important, I think, to read them in connection with the class of action to which the case belonged. Not only was that action not based, as the Lord Justice points out (3), upon any act done by the defendants, but not even upon the omission to do any particular or definite act. The alleged neglect was the neglect of the performance of their duty to provide a satisfactory and healthy system of drainage for a whole district; and, as the Lord Justice also points out (4), the defendants there were under no particular duty cast upon them with reference to any particular individuals. The present case belongs, obviously, to a different class.

Having regard to the language of Lord Cairns in *Atkinson* v. *Newcastle Waterworks Co.* (5), to "the purview of the Legislature in the particular statute and the language which they have there employed,"—the absence of provision for any other remedy, and the precise enactment of a definite duty for the protection of the class of persons to which the plaintiffs, as local residents, belong, against the kind of mischief which has in fact occurred, I am not prepared to say that, even if the breach of statute consisted in the omission to set up a denoting plate, an action on the case would not lie against the defaulting urban authority. It is not, however, necessary in the present case to decide this point. Here there has been not merely an omission to put up a plate truly denoting the position of the fire-plug A, but the putting up of a plate with untrue directions calculated to mislead, as the circumstances have shewn, at just such a time of emergency as that for which the statute, by s. 66, intended to provide.

(1) [1892] A. C. 345, at p. 353.
(2) 12 Ch. D. 102.
(3) 12 Ch. D. 102, at p. 109.
(4) Ibid., at p. 113.
(5) 2 Ex. D. at p. 448.

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There has, it appears to me, been an actual misfeasance, causing damage to the plaintiffs, and in my judgment this appeal must be allowed.

*Appeal allowed.*

Solicitors for plaintiffs: *Young & Co., for Butterfield, Keighley.*

Solicitors for defendants *Church, Adams & Prior, for Alfred Platts, Bingley.*

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*Feb.* 7, 8, 9; *March* 11.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

## WATKINS *v.* THE NAVAL COLLIERY COMPANY (1897), LIMITED.

*Master and Servant—Negligence—Statutory Duty—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58), *s.* 49, *r.* 30.

By s. 49 of the Coal Mines Regulation Act, 1887, "The following general rules shall be observed, so far as is reasonably practicable, in every mine." By r. 30, "There shall be attached to every machine worked by steam, water, or mechanical power, and used for lowering or raising persons, an adequate break or breaks . . . ."

In a coal mine belonging to the defendants a winding engine worked by steam was used for the lowering and raising of persons in a cage. A miner in the employ of the defendants was killed in August, 1909, by an accident while being lowered in the cage. Some years before the accident the then manager of the mine caused a new brake to be attached to the winding machine for the purpose of being used with a larger cage than had theretofore been used, and this cage was afterwards used under the directions of the manager for lowering and raising twenty men at a time. A new manager of the mine was appointed in May, 1909, and in the following month he gave directions that the number of men for the lowering and raising of whom the cage was to be used should be increased to twenty-six, and from that time until the date of the accident, about two months afterwards, the cage was used for the purpose of lowering and raising that number of men. In an action brought by the widow of the deceased miner against the defendants under the Fatal Accidents Act, 1846, in respect of her husband's death, the jury found that the brake was adequate for lowering twenty men, but not for lowering twenty-six men; that the inadequacy of the brake, in conjunction with the defective condition of a spanner

bar, caused the accident; that the inadequacy of the brake was due to the negligence of the manager in ordering twenty-six men to be allowed to be lowered at a time; and that the inadequacy of the spanner bar was due to an error of judgment on the part of the mechanical engineer, and that neither was due to the negligence of the defendants:—

*Held* by the Court of Appeal (reversing the decision of Pickford J.), that s. 49, r. 30, of the Coal Mines Regulation Act, 1887, did not impose upon the defendants as owners of the mine an absolute unqualified obligation, for any breach of which resulting in personal injury to a miner they would be liable in damages, but only an obligation to provide such a brake and such machinery as their expert manager should deem to be adequate, and that the defendants, having supplied brakes and machinery which were adequate when supplied as part of the equipment of the mine, and having been themselves guilty of no negligence causing or contributing to the accident, were not liable.

*David* v. *Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146; [1910] A. C. 74, followed.

*Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402, distinguished.

FURTHER consideration of an action tried before Pickford J. with a jury.

The action was brought by the widow of a deceased workman, named Albert Watkins, on behalf of herself and the infant children of Albert Watkins, to recover damages for a breach by the defendants of their statutory duty under the Coal Mines Regulation Act, 1887, whereby Albert Watkins, who was then a collier in the employment of the defendants, was killed on August 27, 1909, while being lowered into the defendants' coal mine at the Ely Colliery, at Dinas, in the county of Glamorgan; and in the alternative the plaintiff claimed damages for the defendants' negligence in lowering Albert Watkins into the said coal mine, whereby the said Albert Watkins was killed.

The breach of statutory duty alleged by the plaintiff was, so far as material, that an adequate brake was not attached to the winding engine, which was a machine worked by steam and used for lowering and raising persons in the pit. (1) The particulars

(1) By s. 49 of the Coal Mines Regulation Act, 1887, "The following general rules shall be observed, so far as is reasonably practicable, in every mine . . . . Rule 30. There shall be attached to every machine worked by steam, water, or mechanical power, and used for lowering or raising persons, an adequate break or breaks, and a proper indicator (in addition to any mark on the rope) showing to the person who works the machine the position of the cage or tub in the shaft . . . ."

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of negligence alleged that the winding engine was defective and unfit for use in raising and lowering persons in the pit in that the portion of the engine called the spanner bar had a flaw or crack in it, and the defendants continued to use the engine for raising and lowering persons in the mine after it came to their knowledge that the spanner bar was defective.

The defendants, in the defence, denied that they had committed any breach of their statutory duty or were guilty of any negligence; and in the alternative they alleged that, if any breach of statutory duty was committed or if there was any negligence whereby the death of the said Albert Watkins was caused (which was denied), such breach of statutory duty was committed by and such negligence was that of (so far as material) Hollister and/or Dorman, fellow servants of the said Albert Watkins, and they relied on the defence of common employment.

It appeared from the evidence that on August 27, 1909, the deceased man, Watkins, and twenty-seven other men were being lowered into the defendants' coal mine at the Ely Colliery, at Dinas, by means of a winding engine worked by steam, when a portion of the engine known as the spanner bar, which is part of the reversing gear, broke, and the reversing gear failed to act, with the result that the cage in which the men were, and which was then about thirty-two yards from the bottom of the shaft, was thrown violently to the bottom of the shaft, and the empty cage which was being drawn up the shaft by means of the descending cage was drawn violently up into the framing at the top of the shaft, and was broken off from the rope or chains to which it was attached and fell down the shaft on top of the cage in which Watkins and the other men were, killing some of the men, including Watkins, and injuring others.

It further appeared that some few years before the accident happened the then manager of the mine, Creed, caused a new brake to be put in for the purpose of a larger cage which was intended to be constructed. The larger cage was subsequently constructed, and under the directions of Creed it was used for lowering or raising a load of twenty men at a time. Mr. Hollister succeeded Mr. Creed as manager of the mine in May, 1909, and in June of that year he increased the number of men

to be lowered or raised at one time to twenty-six (1), without making a test to see whether the additional number of men would make any difference in the working of the brake. Hollister said that it was unnecessary to make any such test, as he could tell from the general working of the engine that it was quite sufficient. With regard to the spanner bar, the evidence shewed that it had been in use for about twenty-five years, and that on August 24, 1909, a crack was discovered in it, which was pointed out to Mr. Dorman, the mechanical engineer, who repaired it.

Creed in his evidence stated that he only used the engine for lowering and raising twenty men, because that was all that he wanted to send down at one time, and not because he doubted the efficiency of the brake with a load of twenty-six men.

The plaintiff's case was that when the reversing gear broke down the brake was not sufficient to hold the cage with the men in it, and in consequence the accident happened. The defendants alleged that the brake was adequate for lowering twenty-six men, and that it would have held the cage at the time of the accident, but the engineman by mistake put steam upon the engine against the brake and so forced the cage to the bottom of the shaft.

At the trial at Cardiff Pickford J. left certain questions to the jury, which with their answers were as follows:—

(1.) Did the defendants use reasonable care to obtain competent officials?—Answer, Yes.

(2.) Was (*a*) the agent, Mr. L. Llewelyn, (*b*) the manager, Mr. Hollister, (*c*) the mechanical engineer, Mr. Dorman, competent for the duties entrusted to him?—Answer, Yes.

(3.) Was the brake attached to the winding engine adequate for lowering (*a*) twenty men?—Answer, Yes. (*b*) Twenty-six men?—Answer, No.

(1) The manager, in accordance with rule 6 of the special rules applicable to the colliery (hereinafter set out), caused the direction specifying the number of persons to descend or ascend the shaft at the same time to be legibly put up and maintained upon a notice board placed conspicuously on the surface near the shaft, and to be recorded in a book at the colliery. By rules 223 and 224 of the special rules no more than the number of persons specified on the notice board were to be allowed to descend or ascend a shaft.

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(4.) If not, was the use of an unfit or inadequate brake due to the negligence of (*a*) the mechanical engineer or some other and what official of the defendants?—Answer, Mr. Hollister. (*b*) The defendants?—Answer, No.

(5.) Was the spanner bar fit and adequate for its purpose (*a*) when it was fitted?—Answer, Yes. (*b*) On the 27th August?—Answer, No.

(6.) If not, was such unfitness or inadequacy due to the negligence of (*a*) the manager or mechanical engineer, or some other and what official of the defendants?—Answer, Error of judgment on the part of Mr. Dorman. (1) (*b*) The defendants?—Answer, No.

(7.) Were the necessary means taken to repair or avoid the defect in the spanner bar?—Answer, No.

(8.) If not, was the omission to use the necessary means to repair due to the negligence of (*a*) the manager or mechanical engineer, or some other and what official of the defendants?—Answer, Error of judgment on the part of Mr. Dorman. (*b*) The defendants?—Answer, No.

(9.) Was the winding engine on the 27th August in a fit and adequate condition to lower (*a*) twenty men?—Answer, No. (*b*) Twenty-six men?—Answer, No.

(10.) If not, was such unfitness and inadequacy due to (*a*) the condition of the brake; (*b*) the defective condition of the spanner bar; (*c*) both together?—Answer, Both together. (*d*) Some other cause?—Answer, No.

(11.) If not, was such unfitness and inadequacy due to the negligence of (*a*) the manager or mechanical engineer, or some other and what official of the defendants?—Answer, Negligence in ordering twenty-six men to be allowed to descend by the manager. (2) Error of judgment on the part of the mechanical engineer as regards spanner bar. (*b*) The defendants?—Answer, No.

(1) In answer to the learned judge the jury said that, by "error of judgment on the part of Mr. Dorman," they meant that he did not exercise reasonable skill and care in the matter.

(2) The jury, in answer to the learned judge, said that the manager had not exercised proper care and efficiency in examining the work before he ordered twenty-six men to be lowered.

(12.) Was it negligence on the part of (*a*) the manager, or some other and what official of the defendants, (*b*) the defendants, to lower twenty-six men instead of twenty at one time?—Answer, Negligence of manager, Mr. Hollister, and not of defendants.

(13.) Was the accident caused by (*a*) the inadequacy of the brake; (*b*) the defective condition of the spanner bar; (*c*) both combined?—Answer, Both combined.

Upon these findings the learned judge reserved the case for further consideration.

1910. June 20, 21. *Abel Thomas*, K.C., and *John Sankey*, K.C. (*Albert Parsons* with them), for the plaintiff. Rule 30 of the General Rules contained in s. 49 of the Coal Mines Regulation Act, 1887, imposes an absolute statutory obligation upon the defendants, as the owners of the colliery, to provide an adequate brake to be attached to every machine worked by steam, water, or mechanical power, and used for lowering or raising persons; and the fact that rule 5 of the special rules relating to this colliery (1) imposes upon the manager the duty of providing fit and adequate machinery and structures for the purpose of the colliery cannot affect the statutory obligation imposed by r. 30 of s. 49. The jury have found, in answer to the third question, that the brake was not adequate for lowering twenty-six men. The word "adequate" must mean adequate for the purpose for which the

(1) Special rules (made under s. 51 of the Coal Mines Regulation Act, 1887) to be observed at the colliery, rules 3, 5, and 6 coming under the heading of "Manager." Rule 3: "He has the responsible charge and direction of the colliery, and the control of all officers and other persons employed at the colliery." Rule 5: "He must provide fit and adequate machinery and structures for the purpose of the colliery, and take care the same are kept in repair, and he must provide upon the premises at the colliery a sufficient quantity of materials for the purpose of carrying on the colliery with safety." Rule 6: "He shall direct the number of persons to descend or ascend at the same time in a shaft or incline, and the number to descend or ascend in each compartment of a cage or carriage, and shall cause the direction specifying those numbers respectively to be legibly put up and maintained upon a notice board placed conspicuously on the surface near the shaft or incline head, and at each stage or landing from which persons descend or ascend a shaft or incline, and he shall cause the same direction and numbers to be recorded in a book at the colliery."

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engine was being used at the particular colliery, namely, for lowering twenty-six men. It is not like an isolated instance of negligence on the part of a fellow servant of the deceased in allowing on some particular occasion too many men to be lowered in the cage at the same time. The notice required by rule 6 of the special rules that the number of men, namely, twenty-six, to be lowered or raised at the same time should be posted up in the colliery was complied with, and therefore the system deliberately adopted by the defendants at the colliery was to lower and raise twenty-six men at the same time; and by rules 223 and 224 no more than the number of men specified in the notice were to descend or ascend the shaft. "Adequate" means adequate for the system adopted at the particular colliery. That system was in the present case a faulty and defective system, and the defendants are liable as for a breach of the common law obligations of an employer, apart from the provisions of the Coal Mines Regulation Act, 1887: *Smith* v. *Baker & Sons.* (1) A faulty system stands upon the same footing as faulty machinery. The machine here was being "used" for lowering and raising twenty-six men, and it was a defective machine for the purpose for which it was being used. The notice as to the number of men to be lowered or raised at a time was a necessary complement to the machine. The owner would not fulfil his duty by providing the machine without specifying by a notice how many men were to be lowered or raised at a time.

The rules contained in s. 49 are divided into two classes. Some of the rules create an absolute statutory duty in the colliery owner personally, which Buckley L.J. in *David* v. *Britannic Merthyr Coal Co.* (2) calls rules relating to construction; the other rules relate to the management of the colliery, that is to say, to operations to be performed from day to day in the course of the working of the colliery, where the owner must act through his servants. Rule 30 is a rule relating to construction within the judgment of the Court of Appeal in *David* v. *Britannic Merthyr Coal Co.* (3), and imposes an absolute obligation upon the colliery owner, and the latter is liable for a breach of that statutory obligation: *Groves* v.

(1) [1891] A. C. 325, at p. 364. (2) [1909] 2 K. B. 146, at p. 165.
(3) [1909] 2 K. B. 146.

*Lord Wimborne*. (1) Rule 31, as to fencing dangerous machinery, is very similar to the section of the Factory and Workshop Act, 1878, which, as was decided in *Groves* v. *Lord Wimborne* (1), imposes an absolute obligation on the master, who cannot in such a case rely upon the doctrine of common employment. Rule 30 also should be construed as imposing an absolute obligation upon the colliery owner.

Even if it were not part of the system to allow twenty-six men to be lowered in the cage at the same time, the defendants would be responsible if on one or more occasions twenty-six men were allowed to be lowered, for the facts would bring the case within the principle of the decision in *Groves* v. *Lord Wimborne* (1), where the machine had been originally fenced, but for some reason the fencing had been removed, presumably not by the defendant nor by his orders. Sect. 50 of the Act stands by itself and it does not affect the statutory duty imposed upon the colliery owner under any of the rules in s. 49. The plaintiff is therefore entitled to judgment upon the findings of the jury.

*B. Francis-Williams, K.C.*, and *Trevor Lewis*, for the defendants. The jury having found that there was no negligence on the part of the defendants, the plaintiff must rely upon a breach of a statutory duty imposed upon the defendants as the owners of the colliery. Rule 30 of the General Rules contained in s. 49 of the Coal Mines Regulation Act, 1887, is said to impose such an obligation. That rule merely provides that "there shall be attached to every machine worked by steam, water, or mechanical power, and used for lowering or raising persons, an adequate brake"; it does not specify any person upon whom the duty of attaching such a brake is imposed. The special rules of the colliery are framed for the purpose of dividing up the duties assigned respectively to the chief officers employed in the colliery. Sect. 20 of the Act imposes upon the colliery owner or agent the duty of appointing a manager, who is to be responsible for the control, management, and direction of the mine. By rules 5 and 6 of the special rules it is the duty of the manager to provide "fit and adequate machinery," and to take care that the same are kept in repair, and it is his duty to direct the number of persons who

(1) [1898] 2 Q. B. 402.

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are to descend or ascend at the same time in a shaft or incline, and to cause a proper notice specifying the number to be put up. The special rules form a code for the proper working of the mine, and to the manager the above duties are assigned. The jury have found that the use of the inadequate brake was due to the negligence of the manager, and he was a fellow servant with the deceased man. The doctrine of common employment would not be a defence if r. 30 of the General Rules imposes an absolute obligation upon the colliery owner. Rule 30 does not impose such an obligation. There is an absolute obligation upon the colliery owner to appoint a proper manager, and the jury have found that the defendants have done so. They are therefore not liable: *Black* v. *Fife Coal Co.* (1) Rule 30 is a management rule, and it means that there shall, upon the advice of the manager, be attached an adequate brake, and the manager is to be the judge of its adequacy. He has an independent statutory duty in the matter, and does not act merely as the agent or servant of the mine owner and subject to his orders. Assuming that under s. 50 of the Act the mine owner is civilly as well as criminally responsible for failure to take all reasonable means of enforcing the observance of the General Rules, the answers given by the jury to the questions put to them clearly negative any breach of that duty by the defendants. That section tends to negative the contention that r. 30 imposes an absolute obligation on the mine owner. An adequate brake was in fact attached to this engine for lowering and raising twenty men, and this continued for some years, until about two months before the accident the present manager directed twenty-six men to be lowered and raised in the cage at the same time. That was a question of the management of the machinery of the colliery from day to day within the dicta of Buckley L.J. in *David* v. *Britannic Merthyr Coal Co.* (2), and the defendants appointed a competent manager. The language of s. 5, sub-s. 4, of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), upon which *Groves* v. *Lord Wimborne* (3) was decided, is much stronger than the language of s. 49 of the Coal Mines Regulation Act, 1887.

(1) 1909 S. C. 152. (2) [1909] 2 K. B. 146, at p. 165.
(3) [1898] 2 Q. B. 402.

In the former Act the words are "all fencing shall be constantly maintained in an efficient state," and the duty of so maintaining it is clearly thrown on the factory owner, whereas s. 49 of the latter Act provides that "the following general rules shall be observed, so far as is reasonably practicable, in every mine." It is not reasonably practicable that the colliery owner should himself perform the duty imposed by r. 30. He must leave it to the manager. In *Howells* v. *Landore Siemens Steel Co.* (1) the action was based upon negligence, but if the doctrine of statutory obligation was applicable it would in all probability have been raised in that case. If, as Buckley L.J. thought in *David* v. *Britannic Merthyr Coal Co.* (2), s. 50 of the Act applies to civil as well as criminal proceedings, the defendants have discharged the burden of proving that they took reasonable means of preventing the breach of r. 30 by appointing a competent manager. The House of Lords (3), affirming the decision of the Court of Appeal, seem to have adopted the view of Buckley L.J.

Even if r. 30 imposes an absolute obligation upon the colliery owner to attach an adequate brake to the engine, the defendants are not liable, because they attached an adequate brake for lowering twenty men, and the accident occurred through the negligence of the manager, a fellow servant of the deceased man, in directing twenty-six men to be lowered. The dictum of Vaughan Williams L.J. in *Groves* v. *Lord Wimborne* (4) applies. The defendants are therefore entitled to judgment.

*Abel Thomas, K.C.*, in reply. Sect. 20 of the Act is in favour of the plaintiff, because it shews that the manager is responsible for the control and management of the mine, but not for the machinery in the mine. In *Howells* v. *Landore Siemens Steel Co.* (1) there was a breach of one of the management rules in s. 51 of the Coal Mines Regulation Act, 1872, which corresponds with s. 49 of the Act of 1887, and not of a rule relating to construction where the obligation is imposed upon the owner. In *Black* v. *Fife Coal Co.* (5) the judgment was based upon the

(1) (1874) L. R. 10 Q. B. 62.
(2) [1909] 2 K. B. at pp. 166, 167.
(3) [1910] A. C. 74.
(4) [1898] 2 Q. B. at p. 418.
(5) 1909 S. C. 152.

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assumption that the acts had to be done, not by the owners, but by some servant appointed by them. In the present case the obligation was on the colliery owners. With regard to the special rules, they cannot override the General Rules in s. 49. It may be that r. 12 in s. 49, which was under discussion in *David* v. *Britannic Merthyr Coal Co.*(1), does not impose an absolute duty on the colliery owner, because only the shot firer is allowed to fire a shot in a mine.

PICKFORD J. This case raises an important and somewhat difficult question. It arises out of an accident at a colliery belonging to the defendants. The accident happened while some men were going down the pit in a cage, when for some reason the cage, instead of descending slowly, went down too fast, and descended violently to the bottom of the pit. Probably no very great injury would have been occasioned by that in itself, but unfortunately the result of that accident was that the ascending cage was sent up with great violence, and, breaking loose from the rope to which it was attached, fell down the shaft upon the top of the cage which was then resting at the bottom, killing some of the men and seriously injuring others. The plaintiff, who is the widow of one of the men who were killed, brings this action, alleging that the accident was occasioned by a cause for which the defendants are responsible—amongst others, because it was occasioned by a breach of r. 30 of the General Rules in s. 49 of the Coal Mines Regulation Act, 1887.

One question in this case, and one which lay at the root of the matter, was whether the accident was occasioned by a deficient brake coupled with a defect in the spanner bar, or whether it was occasioned by overwinding on the part of the engine driver. That was a question for the jury, who answered it in favour of the plaintiff. They found that the accident was occasioned by the combined effect of the inadequacy of the brake and the defective condition of the spanner bar. If either the inadequacy of the brake or the defective condition of the spanner bar was a matter for which the defendants are responsible, that finding will be sufficient to make them liable in this action. It is contended,

(1) [1909] 2 K. B. 146; [1910] A. C. 74.

however, that the inadequacy of the brake under the circumstances in which it was found to be inadequate by the jury is not a matter for which the defendants are responsible.

As the effect of the rules contained in s. 49 of the Coal Mines Regulation Act, 1887, had been the subject of discussion and of litigation in *David* v. *Britannic Merthyr Coal Co.* (1) shortly before this action came on for trial, and as there had been considerable difference of judicial opinion in regard to the matter, resulting in that case being sent down for a new trial (though it was subsequently settled and not retried), I left a number of questions to the jury in order to insure, if possible, that the present case should not have to be tried again, and that judgment might be entered one way or the other upon the findings of the jury. Whether I succeeded in leaving all the necessary questions is a matter which may have to be discussed hereafter. At any rate I left all the questions which, with the assistance of counsel, I considered to be relevant.

The findings of the jury upon which the argument has been mainly based are these. Question 3: "Was the brake attached to the winding engine adequate for lowering (*a*) twenty men?" Answer, Yes. "(*b*) Twenty-six men?" Answer, No Question 4: "If not"—that is, if the brake was not adequate—"was the use of an unfit or inadequate brake due to the negligence of (*a*) the mechanical engineer or some other and what official of the defendants?" Answer, Mr. Hollister. "(*b*) The defendants?" Answer, No. In answer to question 5 the jury found that the spanner bar was fit and adequate for its purpose when it was fitted, but was not fit and adequate for its purpose on August 27. Question 13: "Was the accident caused by (*a*) the inadequacy of the brake; (*b*) the defective condition of the spanner bar; (*c*) both combined?" The jury answered, Both combined. The other findings to which I may refer generally are that the defendants used reasonable care to obtain competent officials and that the agent, the manager, and the mechanical engineer were competent for the duties entrusted to them; that the winding engine was on August 27 not in a fit and adequate condition to lower either twenty or twenty-six men, and that

(1) [1909] 2 K. B. 146; [1910] A. C. 74.

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such unfitness and inadequacy were due to the combined condition of the brake and spanner bar; and that the defendants, that is to say, the company as apart from their servants, were not negligent. The effect of the findings of the jury is that the defendants took reasonable means to provide against any breach of the statutory regulations and any defect in the machinery.

It is argued for the plaintiff that, in spite of these findings, the defendants are responsible because of the provisions of r. 30 of the General Rules in s. 49 of the Coal Mines Regulation Act, 1887. That rule provides that "there shall be attached to every machine worked by steam, water, or mechanical power, and used for lowering or raising persons, an adequate brake or brakes." The rest of the rule is not material. The effect of the General Rules contained in s. 49 has been discussed in *David* v. *Britannic Merthyr Coal Co.* (1), the actual rule under consideration in that case being r. 12, which deals with the use of explosives for shot-firing in a mine below ground. There was, as I have said, a very considerable difference of judicial opinion upon the matter. Fletcher Moulton L.J. in the Court of Appeal was of opinion that the rules in s. 49 imposed a statutory obligation upon the mine owner, and that he was responsible for any breach, however occasioned, unless perhaps by the fault of the person himself who was complaining of the breach; that it was not necessary to prove negligence on the part of the mine owner; and that it was not open to him to defend himself against the consequences of a breach of the statutory rules by shewing that the breach was occasioned by the negligence of a person for whose negligence he would not be responsible so far as the plaintiff was concerned, that is to say, by the negligence of a fellow servant of the plaintiff. That judgment was certainly not concurred in either by the Master of the Rolls or by Buckley L.J., nor by the House of Lords, and the latter learned judge, as well as the House of Lords, seems to have thought, with regard to the particular rule then under discussion, that it did not impose an absolute obligation upon the mine owner so as to bring the case within the authority of *Groves* v. *Lord Wimborne* (2), and that the extent to which it went was this, that when a breach of that rule occurred

(1) [1909] 2 K. B. 146; [1910] A. C. 74. (2) [1898] 2 Q. B. 402.

the onus was thrown upon the mine owner of proving that he had taken all reasonable means to prevent such breach, and that if the mine owner proved that he had taken all reasonable means he would have a good defence. Although perhaps that is not expressed in the judgments in that case exactly as I have stated it, that is what I understand to be the effect of the judgments of Buckley L.J. and of the House of Lords. The Master of the Rolls, agreeing with Channell J., who tried the action, differed only upon the question of onus of proof. He thought that the onus of fixing negligence upon the mine owner, that is, neglect to take all reasonable means to prevent a breach of the rule, lay upon the plaintiff, whereas Buckley L.J. and the House of Lords were of opinion that, the breach being proved, the onus was cast upon the mine owner of shewing that he had taken all reasonable means to prevent the breach.

It seems to me that the result of that decision is this, that all the General Rules in s. 49 are not of equal stringency. The Master of the Rolls, Buckley L.J., and Channell J. all seem to have been of opinion that some of the rules in s. 49 impose upon the mine owner a liability for a breach of them, although no negligence is shewn, and although negligence is in fact disproved. The Master of the Rolls says that some of the rules, for example r. 15, which provides for manholes being made in an underground road, impose direct obligations upon the mine owner, while other rules impose obligations upon other persons. Buckley L.J. draws the same distinction, and he refers to r. 6, as to the fencing of entrances, and to rr. 18 and 19, as to the fencing of shafts. Channell J. also refers to the same distinction in the passage at the beginning of his summing up to the jury in that case, to which I have been referred. He says (1): "These rules contain certain things which have to be done by the owners themselves. As to those rules it is, of course, quite clear that the statute imposes a duty upon the owners to comply with the rules. But on the other hand the rules also contain a large number of things which are to be done in the mine by the

(1) The learned judge read from a transcript of the shorthand note of the summing up, which is set out in the appendix to the appellants' case in the House of Lords

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servants of the owner." Therefore all those judges draw the distinction between the different rules, though they are all contained in s. 49 of the Act. With regard to the rules which impose an obligation on the mine owner, and which Buckley L.J. calls rules relating to construction (though that is not an exhaustive definition), the liability of the mine owner which is established by the case of *Groves* v. *Lord Wimborne* (1) is a civil liability for a breach of those rules. With regard to the other rules which are said not to impose obligations directly upon the mine owner, his liability is that stated in *David* v. *Britannic Merthyr Coal Co.* (2), namely, a similar liability, unless he proves that he has taken all reasonable means to prevent such breach.

I must say that I find some difficulty in seeing the underlying principle which makes the distinction between those two classes of rules. The one class is said to impose an obligation directly upon the mine owner. The other class is said to impose an obligation upon the servant of the mine owner. In nearly all these cases the provisions contained in the rules have to be carried out by servants, whatever the rule may be. In the case of a limited company, which is by far the most frequent case now, everything must be done by servants, whether it be the fencing of machinery, or the provision of adequate machinery or appliances, or the attending to the shot-firing, or the use of explosives. In the case of other mine owners who are not limited companies the duties imposed by the rules have, in most cases, to be entrusted to servants, though the servant in the one case may be of a different grade from the servant in the other. Therefore I find a little difficulty in seeing the distinguishing principle between the two. However, except for the difficulty which it creates in my mind of finding out under which class this particular rule comes, any difficulty which I feel is wholly immaterial, because the distinction has been already established by the Court, and I have to accept it.

The question under r. 30 arises in this way. According to the evidence a new cage with this brake was supplied some few years before the accident by Creed, who was then the manager of the colliery. The brake was intended to be used for lowering

(1) [1898] 2 Q. B. 402. (2) [1909] 2 K. B. 146; [1910] A. C. 74.

twenty men only in the cage, and it was so used with perfect safety during the time that Creed was the manager. No accident happened, and the jury have found that it was adequate for lowering twenty men. When Creed ceased to be manager and Hollister took his place, the latter made a change, and instead of lowering twenty men at a time he directed that twenty-six men should be lowered at a time. Rule 6 of the special rules of this colliery provides that the manager shall direct the number of persons to descend or ascend at the same time in a shaft or incline and the number to descend or ascend in each compartment of a cage, and shall cause the direction specifying those numbers respectively to be legibly put up and maintained upon a notice board placed conspicuously at certain places. That was done, and from the time Hollister made that alteration that was the way in which the colliery was worked. It was admitted by the defendants that those notice boards were put up. The jury have found—and there was evidence upon which they could find—that the brake was inadequate for the purpose of lowering twenty-six men, and the question which I have to decide is whether under these circumstances there was a breach of r. 30 on the part of the defendants, and, if there was, whether r. 30 imposes an absolute obligation on the defendants within the decision in *Groves* v. *Lord Wimborne* (1), or whether it imposes the limited obligation such as was held in *David* v. *Britannic Merthyr Coal Co.* (2) to be created by r. 12. If it only imposes the limited obligation, the defendants, in my opinion, are entitled to succeed, because the jury have found that they have discharged the onus of shewing that they took reasonable precautions to prevent a breach. If, however, it creates the absolute obligation, as in *Groves* v. *Lord Wimborne* (1), the defendants are responsible.

Applying the distinction as best I can, it seems to me that r. 30 is a rule which imposes what has been called a direct obligation upon the mine owner, and, therefore, if this winding machine had been supplied originally with an inadequate brake it would come within what Buckley L.J. calls a rule relating to construction, and the absolute obligation would arise. But the

(1) [1898] 2 Q. B. 402. (2) [1909] 2 K. B. 146; [1910] A. C. 74.

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solution of the difficulty is not so simple as that. The brake was adequate for the purpose for which it was used in the first instance, but it was inadequate for the purpose for which the subsequent manager used it. "Adequate" is a relative term. One cannot say that a brake is adequate for every purpose. An adequate brake does not mean a brake which is adequate to lower any number of men. It must be adequate with relation to something, and, although it is a difficult question, I have come to the conclusion that the brake must be adequate with relation to the ordinary working of the mine. I do not think that it must be adequate for one isolated negligent act on the part of the manager in sending too many men down. That would be a particular act of negligence on the part of the manager, and if some accident happened it could not be put down to the inadequacy of the brake. In my opinion the brake must be adequate for the ordinary working of the mine.

The question therefore is this, Was this brake adequate for the ordinary working of the mine, or did the accident happen owing to the negligent act of the manager in sending too many men down in the cage, the manager being a person who, under the doctrine of common employment, would be a fellow servant with the plaintiff's husband? The special rules provide for the way in which the ordinary working of the mine is to be regulated, and the ordinary method of working the mine at the time of the accident was to send down, according to the orders of the manager and according to the notices which were posted up, twenty-six men at a time. I do not think that the defendants can say that they have discharged the obligation imposed upon them by r. 30 by supplying an adequate break in the first instance, when it is quite obvious that as time goes on in the course of years the ordinary working of the mine may be altered, and properly altered, by the persons to whom that duty is entrusted. When the working of the mine is altered in that way—not negligently in one instance, but properly altered as part of the system of the ordinary working of the mine—then I think that an obligation arises to see that there shall be attached an adequate brake. In this case the jury have found that it was not adequate for the lowering of twenty-six men, and as that was

the way in which the mine was being worked at that time, in my opinion r. 30 creates the larger obligation, and it is not open to the defendants to exonerate themselves from liability by saying that the sending down of twenty-six men without testing the brake to see whether it was sufficient for them was a negligent act on the part of the manager. For those reasons I think that judgment must be entered for the plaintiff.

I desire to notice, so as to shew that I have not passed it over, the argument arising upon the special rules which impose upon the manager certain duties with regard to providing proper machinery. I do not think that the special rules can override the obligations of the General Rules contained in s. 49. I am fortified in this by what Fletcher Moulton L.J. said in *David* v. *Britannic Merthyr Coal Co.* (1): "I have not thought it necessary to examine at length the special rules. I see nothing in them which clashes with or abrogates anything contained in the General Rules or the clauses of the Act, and I should be slow to attribute any such effect to them, even if at first sight they appeared to raise difficulties. Their object is only to work out and apply the principles of the Act and General Rules in the circumstances of the particular colliery." That, I think, is a true view of the scope of the special rules. They are not intended to and do not override the provisions of the General Rules.

The only remaining observation I wish to make, though it is not necessary to express an opinion, is that I am not inclined to accept all the very wide propositions as to liabilities of mine owners which were put before me in the argument by counsel for the plaintiff. I decide this case simply upon the ground I have stated, namely, that r. 30 of the General Rules in s. 49 of the Act imposes an obligation upon the mine owner to provide a brake adequate for the ordinary working of the mine, and that that is an obligation which must vary with any alteration properly made in the ordinary method of working the mine.

For those reasons judgment must be entered for the plaintiff for 500*l.*, the agreed amount of damages.

*Judgment for plaintiff.*

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(1) [1909] 2 K. B. at p. 163.

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The defendants appealed, asking for judgment or in the alternative for a new trial. The grounds upon which a new trial was asked for were that the following findings of the jury were against the weight of the evidence :—(*a*) that the brake attached to the defendants' winding engine was inadequate for lowering twenty-six men at a time ; (*b*) that the unfitness of the winding engine to lower twenty-six men at a time was due to the condition of the brake as well as to the condition of the spanner bar ; (*c*) that the winding engine was not fit to lower twenty-six men at a time ; (*d*) that the accident was caused by the inadequacy of the brake combined with the defective condition of the spanner bar.

*B. Francis-Williams, K.C., C. A. Russell, K.C.*, and *Trevor Lewis*, for the defendants.

*Abel Thomas, K.C., John Sankey, K.C.*, and *A. Parsons*, for the plaintiff.

[It is considered unnecessary to repeat the arguments, which were substantially the same as those urged in the Court below, of which a detailed report has been given above. The following additional cases were cited :—*Wilson* v. *Merry* (1) ; *Baker* v. *Carter* (2) ; *Stokes* v. *Mitcheson* (3) ; *Searle* v. *Lindsay* (4) ; *Blenkinsop* v. *Ogden*. (5)]

*Cur. adv. vult.*

1911. March 11. VAUGHAN WILLIAMS L.J. read the following judgment :—I have read the judgments of Farwell L.J. and Kennedy L.J., and I agree both in the judgments and in the reasoning ; but I wish to say that in my opinion the judgment of the House of Lords in *David* v. *Britannic Merthyr Coal Co.* (6), as expounded by Lord Halsbury in his speech, is conclusive of the present appeal.

The action in that case was an action for damages in respect of an accident caused by the alleged negligence of the mine owner in not observing the rules prescribed by the Coal Mines Regulation Acts, 1887 and 1896. It was alleged by the plaintiff,

(1) (1868) L. R. 1 Sc. & D. 326.
(2) (1878) 3 Ex. D. 132.
(3) [1902] 1 K. B. 857.
(4) (1861) 11 C. B. (N.S.) 429.
(5) [1898] 1 Q. B. 783.
(6) [1910] A. C. 74.

the widow of William David, who was killed in an explosion which happened in the defendants' colliery, that the explosion was one of coal dust and was caused by the improper firing of a shot in a road of the seam for the purpose of a blasting operation to remove a piece of rock so as to enlarge the main haulage road. The particular rule, the breach of which was alleged in that case to have led to the accident, was r. 12 (*f*), (*h*), (*i*)—those are the clauses relating to the use of explosives below ground—of the statutory rules of the Coal Mines Regulation Act, 1887, s. 49. Lord Halsbury points out (1) that "The action was tried by Channell J. on July 29, 1908, and it was found that the cause of the explosion was the firing of a shot in a dry and dusty part of the mine; that it was fired in a prohibited area where certain precautions were required to be taken, none of which were taken; and, further, there was evidence that gunpowder was found in two holes bored for the purpose of being fired, and evidence was given rendering it reasonably certain that the explosion itself had been caused by gunpowder, a prohibited explosive. It was further found that a man named Watkin Evans, who was seen boring the hole which was to be blasted, gave an order to a man named Miles, a collier, who in consequence fetched 2 lbs. of gunpowder and brought it to his house the day before the explosion. Under these circumstances, which obviously called for some explanation, the burden of proving that the authorities of the mine had done their duty in taking proper care of the safety of the miners lay upon the appellants. Channell J. to my mind misdirected the jury in placing the burden of proof upon the plaintiff in the action." It is plain from this passage which I have quoted that Lord Halsbury did not disapprove of the summing up of Channell J., who tried the case, otherwise than that he misdirected the jury in placing the burden of proof upon the plaintiff in that action, and it was upon the ground of this misdirection that Lord Halsbury said that the verdict could not be allowed to stand and that there must be a new trial, since the verdict arrived at was a consequence of the misdirection. If Lord Halsbury had assented to

(1) This passage is cited from the report in 79 L. J. (K.B.) 155.

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the argument that the statute imposed upon the owners an absolute statutory liability to ensure compliance with these rules by their servants, and that it was a misdirection by Channell J. to tell the jury that if they to the best of their powers did their best to enforce these rules they were not liable in law for damage done by reason of their servants not performing the rules, he would not have simply ordered a new trial, but would either have ordered judgment to be entered for the plaintiffs for an amount to be assessed, or in ordering a new trial would have called attention to the misdirection which negatived the absolute statutory liability and would have pointed out that the question of onus of proving that the authorities of the mine had done their duty in taking proper care of the safety of the miners did not arise, the duty imposed upon the owners being an absolute statutory duty. In fact in that case, if the duty was absolute, there was nothing in dispute but the quantum of damages.

It is argued that some of these rules may impose statutory duties and that some may not do so, and that it does not follow that, because r. 12 (*f*), (*h*), and (*i*) were, by necessary inference, held by the House of Lords not to impose an absolute statutory duty, r. 30 does not impose such a statutory duty. But the judgment of Lord Halsbury makes no such distinction between the rules, and I think that the preliminary words of s. 49, "The following general rules shall be observed, so far as is reasonably practicable, in every mine," apply at all events to every affirmative rule, including r. 30, which is the rule for breach of which the action was brought in the present case. That rule runs thus: "There shall be attached to every machine worked by steam, water, or mechanical power, and used for lowering or raising persons, an adequate brake or brakes, and a proper indicator (in addition to any mark on the rope) showing to the person who works the machine the position of the cage or tub in the shaft. If the drum is not on the crank shaft, there shall be an adequate brake on the drum shaft." The view of Fletcher Moulton L.J., expressed in *David* v. *Britannic Merthyr Coal Co.* (1), that every one of these rules contained in s. 49 imposed a statutory obligation upon the owners of the mine

(1) [1909] 2 K. B. 146.

irrespective of negligence, and that they were responsible for any breach however occasioned, unless perhaps by the fault of the person himself who was complaining, was not assented to by the Master of the Rolls nor by Buckley L.J., nor, indeed, by the House of Lords. In my opinion this appeal should be allowed and judgment entered for the defendants.

FARWELL L.J. read the following judgment:—This appeal turns on the true construction of the Coal Mines Regulation Act, 1887, and the special rules thereunder, for although the pleadings raised an alternative claim of common law liability for negligence, the summing up and the findings of the jury and the judgment of Pickford J. are directed to the question of liability under the statute.

The Act is divided into two parts, and each part is subdivided into fasciculi of sections. Sects. 4 to 10 regulate the employment of boys, girls, and women; ss. 11 to 15 are Truck Act regulations; ss. 16 to 18 forbid the use of single shaft mines and forbid the employment of any one in pits unprovided with two proper shafts properly equipped; s. 19 provides for the division of mines into compartments; ss. 20 to 32 provide for the appointment of certificated managers and their qualifications; ss. 33 to 38 provide for plans, notices, &c.; ss. 39 to 46 deal with inspections; s. 47 deals with arbitrations, and s. 48 deals with coroners. Down to this point the enactments are framed in the usual form of mandate or veto. But Part II., s. 49, commences with a different formula: "The following general rules shall be observed, so far as is reasonably practicable, in every mine," and then follow a number of rules applicable not merely to owners, agents, managers, and workmen, but to all persons who go down into the pits. Sects. 51 to 56 deal with special rules, which have the same effect when made and certified as if they had been inserted in the Act. Sects. 57 and 58 provide for the publication of an abstract of the Act and copies of the rules, and ss. 59 to 70 apply to legal proceedings and penalties. There is nothing in the first part of the Act directly dealing with the equipment of the mine; there is the negative provision in s. 16, but the direct liability of the owner for

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equipment is left to the common law and to the directions in Part II. The general scheme of the Act, in order to provide for the safety of the people using the pit, is, first, to forbid the use of mines at all without at least two properly equipped shafts, and to provide for separate compartments in mines so as to minimize the risk of the men being caught like rats in a hole with no refuge or outlet, and then to compel the employment of a competent and expert manager in every mine so as to minimize risks of working: general rules are enacted applicable to management, and special rules may be added. The owner or agent, if duly qualified, may be himself appointed as manager, but the manager is the pivot upon which the safe working of the mine turns; the owner can no doubt dismiss him, and may even under certain circumstances be bound to do so, but it would, in my opinion, destroy the main usefulness of the Act if the owner was bound to interfere with the manager's orders in the course of working the mine so long as the manager was in charge.

The Act embodies, in my opinion, the statement of Lord Cairns in *Wilson* v. *Merry* (1): "The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. . . . . But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work." This is emphasized in the present case by the special rules. These may be added to in any particular mine as provided by s. 51, "for the conduct and guidance of the persons acting in the management of such mine or employed in or about the mine," and these rules when duly established are to be observed in and about such mine "in the same manner as if they were enacted in this Act," that is to say, as I read it, as if they were added to the General Rules in s. 49 and governed by the prefatory words thereof, for it would be absurd to give a more

(1) L. R. 1 Sc. & D. 326, at p. 332.

direct statutory authority to these special rules than to those actually imposed by Parliament. They are to be read with the General Rules as if they were actually inserted by way of addition to s. 49, neither abrogating nor overriding, but supplementing. This is not a case in which the owner or any specified person is directed by statute to do certain specified things, but one in which rules are made applicable universally so far as practicable—it is a qualified distributive enactment, the practicability being measured both by the nature of the work and by the person made liable to perform it: for example, it is practicable and reasonable to compel all persons, whether owners, managers, workmen, or strangers, who descend into the pits to obey the regulations as to safety lamps and lucifer matches, but it would be absurd to hold the miner liable for the non-provision of a fence to open workings, unless, indeed, he had been properly ordered to put it up and had neglected to do so. Each case must depend on its own circumstances, but it is impossible to say that all the general or special rules are direct absolute enactments binding in all cases and under all circumstances upon all persons or any person in particular. Any given rule may be an absolute enactment on some person, but whether it is so or not, and on whom, must depend on the circumstances of the particular case and the person concerned in it.

I have not, so far, referred to s. 50, on which so much argument has been founded, because, if and so far as there are direct absolute enactments creating a civil remedy for their breach, the terms on which the penal consequences of such breach may be excused have, in my opinion, no bearing on the civil liability,—*Groves* v. *Lord Wimborne* (1)—and I do not think that in a case like the present under s. 49 it really serves as any useful guide to the question of practicability. I doubt if the remission of the penalty has any sufficient bearing on or relation to the civil liability to make it useful or, indeed, admissible as a guide; the test under s. 49 is practicability, and that is a question of fact in each case. The reasonableness of a course of action may possibly be strengthened by shewing that it is sufficient to justify the remission of a penalty, but I do not think that it can have any

(1) [1898] 2 Q. B. 402.

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greater effect. The accident in the present case was occasioned, according to the verdict of the jury, by the inadequacy of the brake for the lowering of twenty-six men, and the defective condition of the spanner bar, which had been cracked and imperfectly mended. The first was due to the negligence of the manager in allowing twenty-six instead of twenty men to be lowered at once, and the second to an error of judgment on the part of the mechanical engineer. The jury have negatived any negligence in the defendant company as distinguished from these officials, and although I am not prepared to say that Pickford J.'s direction as to the company's liability was correct, the appellants, of course, do not complain of it, and there is no cross-notice of appeal. Now the brake was an adequate brake for a load of twenty persons, and it had been used for that number only until two months or so before the accident; the breaking of the spanner bar was due to the insufficient repair of a crack; both of these are matters of management, not of equipment. It is not suggested that the original equipment of the mine was faulty, and it cannot, in my opinion, be successfully contended that the adequacy of the brake must be absolute under all circumstances and for any load; the adequacy is relative to the work required of it, and the extent of such work is for the manager. So, too, the spanner bar and other machinery are not to be such as never to require repair, but the repair, when required, must be such and done in such a way as the manager shall direct. It is reasonably practicable for the owner to find the money to pay for the brake and the repairs, and for the manager to ascertain and direct the adequacy of such brake and the nature and mode of such repairs; but it is no more reasonably practicable for the owner to ascertain and direct such adequacy and repairs than it would be for the manager to find the money to pay for them, and that this latter is not to be expected of the manager appears from the judgment of Cockburn C.J. in *Hall* v. *Hopwood*. (1)

Turning now to general rule 30 of s. 49 and the special rules, it is enacted that so far as practicable "there shall be attached to every machine worked by steam, water, or mechanical power, and used for lowering or raising persons, an adequate brake

(1) (1879) 49 L. J. (M.C.) 17.

or brakes"—I need not read further than that. The special rules contain definitions as follows: "Colliery" means the colliery and includes all structures and machinery on the surface, and the mine and all structures and machinery in the mine. Then there comes the definition of "mine," and then there is a definition of "structure," including nearly everything that can well be thought of. Then there is a definition of "machinery," also set out in extenso, but I will not pause to read it; it finishes by the inclusion of "every other appliance or apparatus, or thing provided or used at the colliery."

Then comes, under the head of "Manager," this provision: "The following rules are obligatory upon and must be obeyed by the manager of the colliery." No. 3 is, "He has the responsible charge and direction of the colliery and the control of all officers and other persons employed at the colliery." When one bears in mind that definition, it practically makes him commander-in-chief of everything. Then No. 5 says: "He must provide fit and adequate machinery and structures for the purpose of the colliery, and take care the same are kept in repair, and he must provide upon the premises at the colliery a sufficient quantity of materials for the purpose of carrying on the colliery with safety." Then No. 6 says: "He shall direct the number of persons to descend or ascend at the same time in a shaft or incline, and the number to descend or ascend in each compartment of a cage or carriage, and shall cause the direction specifying those numbers respectively to be legibly put up and maintained upon a notice board placed conspicuously on the surface near the shaft or incline head, and at each stage or landing from which persons descend or ascend a shaft or incline, and he shall cause the same direction and numbers to be recorded in a book at the colliery."

The reasonable construction of these rules is, in my opinion, that they are a direct enactment on the owner to provide such a brake and such machinery as the expert manager shall deem necessary, and on the manager to see that such brake and machinery are adequate, and to direct their use with reference to the extent of adequacy provided by him. The owner cannot reasonably be expected to do more than provide all that the expert whom he is

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compelled by the Act to employ deems necessary—the responsibility for the correctness of the advice rests with the expert who gives it. Take, for instance, rule 6, which I have just read. It is impossible for the owner to direct the number who are to ascend or descend at the same time and to interfere with the manager's discretion in altering such numbers from time to time. I cannot agree with Pickford J. that the alteration of the numbers makes any difference; it is a question for an expert in the first instance for how many persons the brake will suffice, and it remains a question for him if and whenever any alteration is made from time to time. There is certainly nothing in *Groves* v. *Lord Wimborne* (1) that conflicts with this, for the enactment there imposed a direct absolute duty on one man only, the occupier of the factory; nor in *David* v. *Britannic Merthyr Coal Co.* (2), the net result of which is that s. 49 does not impose a direct absolute duty in all events on the owners; this is apparent from the summing up of Channell J., approved by Lord Halsbury and the House of Lords, except as to the onus of proof: if this were not so, the House would have entered judgment instead of ordering a new trial. Having regard to the wide divergence of opinion in the Court of Appeal in that case, not only between the dissenting and assenting members of the Court but also between the assenting members inter se, and to the disapproval of some, without specifying which, of those reasons by the House of Lords, I think it is safer to put them respectfully aside and treat the matter as res integra except to the extent above stated. In my opinion this appeal succeeds, and judgment should be entered for the defendants with costs here and below.

KENNEDY L.J. read the following judgment:—I think this appeal must be allowed and judgment entered for the defendants. The action, as brought, included two grounds of claim, negligence at common law and breach of statutory enactments contained in the Coal Mines Regulation Act, 1887. According to the findings of the jury, the first cause of action clearly failed in proof. According to these findings there was no negligence of the

(1) [1898] 2 Q. B. 402. (2) [1910] A. C. 74.

defendants causing injury to the plaintiff apart from the negligence of certain of their officials in actual charge of the working of the mine and its machinery, who in law were fellow servants of the deceased. The application of the rule, therefore, of common employment exonerated the defendants from liability to the plaintiff so far as it was sought to base that liability upon the common law.

In regard to the plaintiff's claim as based upon the breach of statute, and asserting an absolute liability in the defendants as mine owners for a breach, through negligence of their servants, of rules contained in s. 49 of the Coal Mines Regulation Act, 1887, this Court is, I think, precluded from affirming the judgment of Pickford J. by the decision of the House of Lords in *David* v. *Britannic Merthyr Coal Co.* (1) We are bound to construe the statute as the House of Lords in the case to which I have just referred has, I think, by necessary inference declared that it should be construed. The House of Lords in *David* v. *Britannic Merthyr Coal Co.* (1) could not have decided as it did, that a new trial should be granted, and would or at least might have decided that judgment should be entered for the plaintiff, unless it intended to hold that, in a civil action for damages based upon non-compliance with the rules in s. 49, the mine owners might make out a complete defence by proving that the contravention of the rules upon which the action was based was brought about notwithstanding that the defendants had taken all reasonable means to prevent it. In the present case the jury have in effect found that the defendants have not neglected reasonable means to prevent the breach of the rules contained in the Act.

It is urged on behalf of the plaintiff that the opinions in the House of Lords were given in reference to a different rule from that the breach of which forms the basis of the claim in the present action. That is true, and there are certainly distinctions drawn, or at least suggested, by the Master of the Rolls in *David* v. *Britannic Merthyr Coal Co.* (2), when that case was in the Court of Appeal, in regard to the direct and absolute liability of the mine owners under some of the rules as compared with their qualified liability under others; but I am not satisfied of the

(1) [1910] A. C. 74. (2) [1909] 2 K. B. 146.

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soundness of any such distinction, if attempted to be drawn between any of the statutory provisions under consideration in the House of Lords and those which are under consideration in the present case. I have had the opportunity of reading the judgment of Farwell L.J. in the present case, and he has so fully dealt with the language of the statute that it would serve no useful purpose to examine it in detail.

There are only two other points, discussed in this Court, to which I think I ought to advert. In regard to s. 50 and s. 51, sub-s. 3, the provisions contained in those sections, which deal with offences chargeable in respect of a contravention of general rules and special rules respectively, afford in my opinion no sound foundation for inferences or conclusions in respect of liability of the mine owner to civil claims for injuries arising out of such a contravention. I think that the judgments of the Court of Appeal in *Groves* v. *Lord Wimborne* (1) support this view. And, lastly, I am of opinion that the same case of *Groves* v. *Lord Wimborne* (1) cannot be treated as an authority in the plaintiff's favour. The language of the Factory and Workshop Act, 1878, is, in my judgment, materially different, so far as regards the direct and absolute responsibility of the occupier of the factory for a contravention of the provisions of that statute, from the language used in the Coal Mines Regulation Act, 1887, in regard to the liability of the mine owner; and indeed the provisions of the last-named Act expressly and distributively impose duties upon certain named officials whom the mine owner is bound to employ.

One may be unable to discern any reason a priori why the Legislature should have given to the worker in the factory a right of compensation from his employer by civil action which it has not given to the miner in his occupation, which is at least as dangerous as that of the factory hand, where an injury is caused by the use of unsafe machinery; but our duty is simply to construe the language of the statutes; and, for the reasons I have endeavoured to state as briefly as possible, I do not think that, upon the findings of the jury at the trial, the Coal Mines Regulation Act, 1887, gives the plaintiff in this action such a

(1) [1898] 2 Q. B. 402.

remedy against the mine owners for injury due to unsafe machinery as she has sought to enforce.

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*Appeal allowed.*

Solicitors for plaintiff: *Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & James, Pontypridd.*

Solicitors for defendants: *Barlow, Barlow & Lyde, for C. & W. Kenshole, Aberdare.*

W. J. B.

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[IN THE COURT OF APPEAL.]

C. A. 1911 *March* 14.

## HAYDON *v.* HAYDON.

*Practice—Commitment for Debt—Order for Payment of Debt or Instalment—Service of Order—Debtors Act,* 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

Where proceedings are taken under s. 5 of the Debtors Act, 1869, for the committal to prison of a judgment debtor who has made default in payment of a debt or instalment of a debt due from him in pursuance of an order of a competent Court, it is not necessary that the order of the Court for payment shall have been served personally on the judgment debtor, although personal service upon him of the judgment summons is required by Order XXV., r. 25 (1.), of the County Court Rules.

APPLICATION of the defendant for leave to enter an appeal from an order of Phillimore J., sitting in bankruptcy, without lodging in the High Court the sum of 20*l.* required by r. 131 of the Bankruptcy Rules to be lodged as security for the costs of an appeal.

On December 9, 1907, the plaintiff obtained in the Divorce Division a decree of judicial separation from her husband, the defendant, and on April 3, 1908, she obtained an order for payment of permanent alimony by the defendant by instalments of 5*l.* per week. No instalments were ever paid under the order, and in January, 1911, when 790*l.* was due and payable by the defendant, the plaintiff issued a judgment summons out of the High Court by which the defendant was required to appear

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personally on January 21 to be examined touching the means which he had then, or which he had had since the date of the order, to pay the said sum. This summons was personally served upon the defendant. At the hearing of the summons on January 21 the defendant was present and was orally examined as to means, and in the result the defendant was ordered to pay 20*l.*, part of the amount due, on or before January 28, and the summons was adjourned to February 25 so far as regarded the balance of the debt. This order was not served personally upon the defendant, but service was accepted by his solicitor. The defendant did not pay the 20*l.* or any part of it, and on February 17 a further summons was issued calling upon the defendant to appear personally before the judge to be examined touching the means he had, or had had since the date of the order to pay 20*l.*, in payment of which he had made default, and also to shew cause why he should not be committed to prison for such default; this summons was personally served on the defendant. On February 25 the defendant appeared at the hearing of the summons, when it was proved to the satisfaction of Phillimore J. that the defendant had had since the date of the order means to pay the 20*l.* and that he had neglected to pay it; an order was therefore made for the committal of the defendant for forty-two days unless he should sooner pay that amount; but the order was directed to lie in the office and not to issue if the defendant should pay the 20*l.* on or before March 11. Service of this order was accepted by the defendant's solicitors. No part of the 20*l.* was paid by March 11, but on that day the defendant gave notice of appeal against the order of February 25, and also made the present application ex parte to the Court of Appeal, who directed notice of the application to be given to the plaintiff and the appeal to be entered forthwith, and adjourned the proceedings to March 14, staying the execution of the committal order in the meantime. The hearing of the application on March 14 was treated as the hearing of the appeal from Phillimore J.

*Lewis Thomas, K.C.* (*B. O. Bircham* with him), for the defendant. The circumstances are such as to justify this Court

in exercising in favour of the defendant the power given to it by r. 131 of the Bankruptcy Rules of dispensing with the security required by that rule to be lodged in ordinary cases. There was no jurisdiction to make the committal order of February 25, for there had been no personal service of the order of January 21 to pay the 20*l.*, for non-compliance with which the committal order was made. If personal service of the order for payment was necessary, it is immaterial that the defendant was present when that order was made: *In re Tuck* (1), between which case and the present there is a close analogy. It is admitted that there was jurisdiction to make the order of January 21, but the order of February 25 was made without jurisdiction, for the fact that the order of January 21 had not been personally served upon the defendant was brought to the knowledge of the judge by the defendant's affidavit. The County Court Rules for the time being in force as to the committal of judgment debtors, with any necessary modifications, are by r. 361 of the Bankruptcy Rules made applicable to all Courts exercising jurisdiction under s. 5 of the Debtors Act, 1869; and although there is no rule which in positive terms makes personal service of an order to pay a sum of money requisite in order to lay the foundation of proceedings for commitment, the fact that the judgment summons itself must be personally served, and the analogy of the practice in the Chancery Division (as illustrated by *In re Tuck* (1)) of requiring personal service of an order for payment of a sum of money in order to found an application for an attachment for disobedience to such an order, are conclusive to shew the necessity in the present case of personal service of the order of January 21 upon which the proceedings for commitment were based.

*R. J. Willis*, for the plaintiff, was not called upon.

VAUGHAN WILLIAMS L.J. We are all agreed that this appeal must be dismissed. The main contention of the defendant's counsel has been that the committal order of February 25 was made without jurisdiction because the original order of

(1) [1906] 1 Ch. 692.

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January 21 for payment of the 20*l.* had not been personally served upon the defendant. Reliance was placed upon a suggested analogy between the present case and *In re Tuck* (1), where it was held that a writ of attachment will not usually be issued against a trustee for disobedience of an order directing him to pay money into Court unless the order has been personally served upon him, and that the fact that the order was made by consent and that the trustee was in Court when it was made will not make personal service unnecessary. But *In re Tuck* (1) was obviously not a case in which the provisions of the Debtors Act, 1869, in any way came in question; it only had to do with a simple order of a judge of the Chancery Division for payment into Court of a sum of money. A judgment summons itself must of course be served upon the judgment debtor; that is required by Order xxv., r. 25 (1.), of the County Court Rules; but I can find no rule, and counsel has not been able to refer me to one, which requires personal service of the order to pay upon which the proceedings for committal are founded; it is the summons, and not the order to pay, which must be served personally. And there is sound reason for this; the summons tells the judgment debtor exactly what may be done in the matter and what order may be made against him, and there is obviously in the case of such a document the best reason for insisting upon personal service. I can, however, see no reason for requiring personal service of the order to pay, and, a fortiori, there can be no such reason where the judgment debtor was actually present when the order to pay was made and was fully cognizant of its nature. I am not disposed to extend the rights of a judgment debtor who has had the means to pay but has not paid; I agree with the observations of Lord Bramwell in *Stonor* v. *Fowle* (2), that "in truth this power of committal is not an imprisonment for debt, it is an imprisonment for past dishonesty, together with the prospect of the plaintiff getting his money." Apart altogether from the question of jurisdiction, I see no reason in the circumstances of the present case for granting the judgment debtor the indulgence sought by allowing his proposed

(1) [1906] 1 Ch. 692. (2) (1887) 13 App. Cas. 20, at p. 28.

appeal to be set down without lodging the security required by r. 131 of the Bankruptcy Rules. (1)

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FARWELL L.J. and KENNEDY L.J. concurred.

*Appeal dismissed.*

Solicitors for plaintiff: *Victor Thomasset & Co.*
Solicitor for defendant: *W. P. Davies.*

W. J. B.

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## YOUNG & CO. *v.* LIVERPOOL ASSESSMENT COMMITTEE.

1911 *Jan.* 26, 27.

*Poor Rate—Exclusive Occupation—Power of Mersey Docks and Harbour Board to grant "Demise" of Premises—Bonded Warehouse—Privileges reserved to Mersey Docks and Harbour Board in respect of Machinery on demised Premises—Mersey Dock Acts Consolidation Act*, 1858 (21 & 22 *Vict. c. xcii.*), *ss.* 64, 80, 82—*Mersey Docks (Corporation Purchase) Act*, 1861 (24 & 25 *Vict. c. clxxxviii.*), *s.* 39.

The Mersey Docks and Harbour Board have power to part with the exclusive possession of their premises for purposes not inconsistent with their special Acts so as to create a rateable occupation in the grantee.

By an indenture of lease the Dock Board demised to the respondents certain sections of the vault at Wapping Dock warehouses together with a portion of the quay floor of the warehouses for a term of seven years for use only as a bonded warehouse. The lease provided that the respondents were to pay all rates and taxes; to keep the inside of the premises and all erections, fixtures, and fittings thereon other than certain hydraulic and other plant and machinery belonging to the Board in good and tenantable repair; that they were not to assign or sub-let or part with the possession of the premises without the consent of the Board in writing; and that they were to permit the Board at all reasonable times to enter the premises to view the condition thereof or to repair the Board's plant and machinery. It also provided that the respondents might make alterations in the premises for the purposes of their business in accordance with plans approved by the Board's

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(1) No formal judgment was in fact delivered, beyond the dismissal of the appeal. At the request of the Court the interlocutory observations of the Lords Justices have been recast in the form of a judgment, which has been approved by their Lordships.

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engineers, but prohibited them from storing any goods at any time over certain pipe trenches or machinery pits.

It was also provided that the respondents would not store any goods or do anything in or about the demised premises which should in the judgment of the Board be likely to cause danger or injury to the premises or other property or which might in its judgment be offensive or a nuisance, and that they would not use fires and lights on the premises except in accordance with the Board's by-laws under such arrangements as might be made by the Board's chief warehouse manager, and would pay a tonnage rate to the Board on goods lifted by the cranes at the demised premises, and that they would pay for the attendance of the Board's officers and any other expenses which might be incurred for any period during which the demised premises might be kept open before or after ordinary business hours, and further that the use of the premises "shall be so worked by the company as not to cause any interference with or obstruction to the general working of the dock estate and that the servants of the Board shall at all reasonable times have free access thereto for the purpose of such general working."

The premises comprised in the lease were wholly within the dock walls, and access to them could only be obtained by passing through gates and over land under the absolute control of the Board. They were separated from the remaining portion of the warehouses and quay floor by solid brick walls. The entrance to and egress from the premises was by a door on which there were two locks, the key of one being kept by the Customs and that of the other by the respondents. For the door to be opened it was necessary that both keys should be used, and without the co-operation of the Customs and the respondents the door could not be opened, but the Board had the right of access to the premises through the door at all reasonable times. The door opened on to the quay floor, and from there access to the vault floor was obtained by means of a circular iron staircase leading downwards from the centre of the quay floor. A hydraulic main ran down the centre of the vaults, and on each side of the vaults were twelve machinery pits. The machinery in the pits worked a number of cranes and lifts belonging to the Board, of which one crane and one lift only were in the premises demised to the respondents, who paid for their use a tonnage rate to the Board on goods lifted. The working of these cranes and lifts made it necessary that one or more of the employees of the Board should go down into the vaults several times a day and stay there for periods ranging from ten minutes to the whole day according to the amount of work to be done. The respondents had to leave for the use of the Board and persons authorized by them free access to the hydraulic mains and machinery, and to secure such access an alleyway had to be always kept clear of goods. The respondents having been rated to the poor rate in respect of the premises:—

*Held*, that they were rightly rated as occupiers inasmuch as a grant by the Board of exclusive occupation of the premises to the respondents for the purposes of a bonded warehouse was not inconsistent with the purposes for which the Board was constituted or with the performance

of its statutory powers and duties. The word "demise" used in the lease prima facie imported a grant of exclusive occupation. The nature of the respondents' business was not consistent with anything but exclusive occupation subject to the control of the Customs authorities, and the privileges given to the Board were only occasioned by the fact that there was upon the demised property machinery which the Board wished to utilize during the term.

*Allan* v. *Liverpool Overseers* and *Inman* v. *Kirkdale Overseers*, (1874) L. R. 9 Q. B. 180, and *Rochdale Canal Co.* v. *Brewster*, [1894] 2 Q. B. 852, distinguished.

SPECIAL CASE stated by the Recorder of Liverpool.

The respondents Young & Co. were wine and spirit merchants trading in the city of Liverpool.

In a poor rate made by the overseers of the poor for the parish of Liverpool the respondents were rated and assessed as the occupiers of certain premises at Wapping Dock, the property of the Mersey Docks and Harbour Board (hereinafter called "the Board").

The following are particulars of the assessment:—

| Description of Property. | Gross Estimated Rental. | Rateable Value. |
|---|---|---|
| No. 28,522 Vaults, Sections C D E, part of southernmost section of quay floor . . | £700 | £630 |

The system of docks at Liverpool is under the control o the Board and is managed by them under the Mersey Dock Acts

(1) The Mersey Docks (Corporation Purchase) Act, 1861 (24 & 25 Vict. c. clxxxviii.), s. 39: "The Board may from time to time, if they shall deem it expedient, but not otherwise, and upon such terms and conditions, and upon payment of such rent or other sum of money, and subject to such restrictions and regulations, as they shall think proper, demise or lease to any railway or other company, or to or for the benefit of any associated members of any particular trade or trades, or to any other persons or person whomsoever, for any term not exceeding twenty-one years, the whole or any part of any warehouse or warehouses, or any stack or pile of warehouses, whether already erected or hereafter to be erected, or any land as a site for a warehouse or warehouses, which, consistently with the objects and purposes of this Act and the before-mentioned Acts relative to the Mersey Docks and Harbour Board, may be used and enjoyed by the lessees or tenants thereof, notwithstanding the warehouse or land so demised may be situate in or form part of a warehouse dock, and all money arising

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Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), and certain by-laws made thereunder.

By s. 64 of the Act of 1858, "The Board may from time to time, if they shall deem it expedient but not otherwise, and upon such terms and conditions and upon payment of such rents or other sums of money, and subject to such restrictions and regulations as they shall think proper, set apart and appropriate any particular portion of any dock, wharf, quay, warehouses, sheds, or other works, with the appendages thereto, for the exclusive accommodation and use of any canal or railway company, or of any company or firm or individual engaged in carrying on any particular trade, who shall be desirous of having such exclusive accommodation for the reception of the vessels and goods belonging to or employed and conveyed by them: Provided that every company, firm, or individual to whom such exclusive accommodation as aforesaid shall be afforded, and their vessels, crews, servants, and other persons employed by them or under their control, shall be subject to the general rules and regulations of the Board applicable to their docks, wharves, warehouses, sheds, and works, and the vessels entering the same, and the crews and other persons employed in and about such vessels." By s. 80 of the Act, "The exclusive jurisdiction and management of the quays of the Board is hereby vested in the Board, and shall not be interfered with by any person whomsoever." By s. 82 of the Act, "The Board may construct such depots and sheds for the reception of goods, and may construct and erect such steam engines, cranes, hoisting and weighing machines, and other apparatus for facilitating the

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from such letting or demise shall be applied by the Board in aid of their general expenditure: Provided always, that every such warehouse, and all goods deposited or being therein, and all persons employed in or about such warehouse, or being within or about the same, shall be subject to the general rules, regulations, and by-laws of the Board, except that the prohibition contained in section 183 of the Mersey Dock Acts Consolidation Act, 1858, against allowing persons other than those appointed and employed by the Board to work within the walls of any warehouse dock, shall not extend to persons employed in or about any warehouse which may have been so demised or leased as aforesaid."

loading and discharge or the masting and unmasting of vessels, and tanks for watering horses and cattle, and may provide such other conveniences upon or near the quays, as they shall think expedient for the accommodation of the trade of the port of Liverpool, and may make reasonable charges for the use of any of such depots, sheds, steam engines, cranes, hoisting and weighing machines, and other such apparatus and conveniences as aforesaid, and may let any such sheds and also any portions of the quays, which, with or without such sheds, they may think fit to appropriate as special berths for vessels in any particular trade or otherwise, for such periods, and at and on such rents, terms, and conditions, as they may deem expedient."

In pursuance of their statutory power the Board by an indenture of lease dated May 29, 1907, demised to the respondents the southern sections C, D, and E of the vault at Wapping Dock warehouses together with about 562 square yards of the southernmost section of the quay floor of the warehouses for a term of seven years at an annual rental of 700*l.*, payable monthly in advance, for use only for the storage, blending, and manipulation of wines and spirits in bond.

The lease (so far as material) was as follows: It witnessed that "in consideration of the rent and covenants on the part of the" respondents "hereinafter reserved and contained the Board do hereby demise to the" respondents "(subject to the reservation hereinafter mentioned and excepting out of this demise the plant belonging to the Board) the three southern sections (C D and E) of the vault at the Wapping Dock warehouses of the Board in the city of Liverpool and a portion (about 562 square yards) of the southernmost section of the quay floor of the said warehouses to hold unto the" respondents "from the first day of October, 1907, for the term of seven years . . . . yielding and paying for the whole of the said premises during the said term the yearly rent of 700*l.* the rent to be paid monthly in advance on the first day of each calendar month in each year. And the company do hereby covenant with the Board as follows:"

1. To pay the rent and other charges.

"2. That they will in addition to the said rent and charges pay and discharge all rates taxes charges duties burdens

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impositions assessments and outgoings whatever whether parliamentary parochial or otherwise which now are or at any time hereafter may be assessed charged or imposed upon the said premises or any part thereof or on the owner or occupier thereof except as aforesaid.

"3. That they will at all times during the said term keep the inside of the premises and all erections fixtures and fittings thereon other than the hydraulic and other plant and machinery belonging to the Board in good tenantable repair and condition in all respects to the satisfaction of the engineer for the time being of the Board (hereinafter called 'the engineer') and so leave the same at the expiration or sooner determination of the said term.

"4. That they will use the premises only for the storage blending and manipulation of wines and spirits in bond.

"5. That they will not assign or sub-let or part with the possession of the premises hereby demised or any part thereof without the previous consent in writing of the Board and also will not stand possessed of the said premises or any part thereof upon any trust to assign or dispose of the same without the like consent but the consent required by this clause shall not be arbitrarily withheld from assigning or sub-letting to a respectable and responsible person.

. . . . . .

"7. That they will permit the Board and all persons authorised by them at all reasonable times to enter the premises to view the condition thereof or to overhaul repair or make good the Board's plant and machinery on the premises and to give or leave notice in writing upon the said premises for the company of all defects and want of repair there found and will with all despatch well and sufficiently repair and make good such defects and want of repair whereof notice shall have been so given or left and as the" respondents "are bound by law or under their covenants herein to repair and make good and if so required under the inspection of and in such manner as shall be directed by the Board or such person or persons as shall be appointed by them for that purpose and in default thereof the Board or the person or persons appointed by them for that purpose shall be at liberty to carry out such repairs and amend all such defects and want of repair

whereof such notice shall have been given or left as aforesaid at the expense of the " respondents.

"8. That the Board shall except as is herein provided be at no expense whatever with regard to the premises Provided always that it shall be lawful for the" respondents " to make such alterations in the premises as may be requisite to adapt the same to their business such alterations are to be made in accordance with plans to be first approved by the dock engineer and the work to be carried out to his satisfaction in all respects and to meet the requirements of the Fire Salvage Association of Liverpool Limited The alterations shall include the erection by the company of vats The said vats are to be enclosed and to be erected in such a way that they can only be filled from the portion of the quay floor which is included in this demise The work of erection and the communications between the vats and the portion of the quay floor to be carried out to the satisfaction of the said Fire Salvage Association of Liverpool Limited

. . . . .

"11. That they will not stow any goods at any time over the pipe trenches for the hydraulic mains or over the machinery pits in the three sections C D and E of the vault forming part of the demised premises.

"12. That they will not in using the premises for the purposes mentioned in clause 4 store any goods or do anything in or about the said demised premises which shall in the judgment of the Board be likely to cause danger or injury to the demised premises or other property or which may in their judgment be offensive or a nuisance.

"13. That they will not use fires and lights on the demised premises except in accordance with the Board's by-laws rules and regulations from time to time in force and under such arrangements as may be made by the Board's chief warehouse manager.

"14. That they will pay to the Board a charge of one farthing per ton for the hydraulic power to work the cranes at the demised premises if and when the same be used by the company and that they will keep an account of the weight of goods lifted by the cranes and will furnish the Board monthly

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returns of the same and permit an authorized agent of the Board to inspect such amount.

"15. That they will pay for all water and gas or electric lights which may be used by them on the demised premises for the purpose of their business and in connection with such user will conform to the Board's by-laws from time to time in force and with such arrangements as may from time to time be made by the Board's chief warehouse manager and will first obtain the approval of the Fire Salvage Association of the lights which they may propose to use from time to time provided always that such approval shall not in any way free the company from liability in respect of anything arising out of the using or fixing of any of such lights.

. . . . .

"17. That they will pay for the attendance of the Board's officers and any other expenses which may be incurred for any period during which the demised premises may be kept open before or after ordinary business hours.

"18. That they will indemnify the Board in respect of all claims for Customs duties on any goods which may be placed in or on the demised premises in consideration of the demised premises being included in the bond given by the Board to the Crown in connection with the Board's warehouses.

. . . . .

"23. . . . . And it is further agreed that the Board shall except as herein provided be at no expense with regard to the premises. And that the Board may at all times during this demise pass or affix or give authority to pass or affix telegraphic or telephonic wires poles cables and their accessories in or upon across or under the demised premises and also may alter or remove any or all of such wires poles cables and accessories at any time.

"Provided always that the use of the premises hereby demised shall be in all respects subject to the by-laws rules and regulations of the Board in force from time to time and shall be so worked by the company as not to cause any interference with or obstruction to the general working of the dock estate and that the servants of the Board shall at all reasonable times have free access thereto for the purpose of such general working."

The premises comprised in the lease were wholly within the dock walls, and access to them could only be obtained by passing through gates and over land under the absolute and exclusive control of the Board. The premises were separated from the remaining portion of the warehouses and quay floor by solid brick walls which were built by the Board just before the respondents took possession and were necessary to satisfy the requirements of the Customs before the premises could be used as a bonded warehouse. The premises were included in the bond mentioned in clause 18 of the lease given by the Board to the Crown in connection with the Board's warehouses. The entrance to and egress from the demised premises was by a door on the east side of the same. There were two locks on the door, and a key of one was kept by the Customs and a key of the other by the respondents. For the door to be opened it was necessary that both keys should be used, and without the co-operation of the Customs and the respondents the door could not be opened, but the Board had the right of access to the premises through the door at all reasonable times. The door opened on to the said portion of the quay floor and from there access to the vault floor was obtained by means of a circular iron staircase leading downwards from the centre of the quay floor. Goods were brought into the premises through the door and were lowered into the vault by means of an enclosed lift or well, which was the only one used for such purpose or of which the respondents had any right of user. There was originally a doorway with iron doors at the extreme north end of the vault section demised to the respondents, but the same was bricked up prior to the use of the premises by the respondents as a bonded warehouse. Goods intended for the respondents' premises and their employees engaged in them had to pass through the gates under the control and over land in the occupation of the Board before reaching the door. A hydraulic main ran down the centre of the vaults, and on each side of the vaults were twelve machinery pits. The machinery in the pits worked a number of cranes and lifts, of which one crane and one lift were in the premises demised to the respondents, while the remaining cranes and lifts were in premises not demised to them and had nothing to do with the demised premises or their user. The crane and lift in the

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premises demised to the respondents were not their property and the user by them was subject to payment to the Board of a tonnage rate on goods lifted as provided by clause 14 of the lease. All these cranes and lifts were the property of the Board and were used by or let on hire by them for the purpose of loading and discharging vessels in the Wapping Dock and/or carrying and/or hoisting goods belonging to other persons to warehouses and premises other than those demised to the respondents. The working of these cranes and lifts made it necessary that one or more of the employees of the Board should go down into the vaults several times a day and stay there for periods ranging from ten minutes to the whole day according to the amount of work to be done. The respondents had to leave for the use of the Board and persons authorized by them free access to the hydraulic mains and machinery, and to secure such access an alleyway had to be always kept clear of goods. There was a staircase leading down from the quay to the vaults in question, with a door at the bottom which was fastened, and it was not clear whether this door was ever used or not, but the Board kept the key thereof and the respondents did not use the door. Until the year 1909 the respondents were not separately rated in respect of the premises.

It was contended by the respondents that they were not liable in law to be rated in respect of the premises on the ground that they had not such exclusive occupation as would render them rateable, and that the Board had not parted with the exclusive possession of the premises and had always retained control of the same.

The appellants, the assessment committee, contended that the respondents were by the lease of May 29, 1907, in such occupation of the premises as to make them liable to be rated as occupiers of them, and that the Board had not retained such a general control of the premises as to free the respondents from that liability.

The recorder was of opinion that the Board had not parted with the exclusive possession and had not given to the respondents such exclusive occupation as would render them liable to pay rates.

The question for the opinion of the Court was whether he was right in holding that the respondents were not liable to be rated as occupiers of the premises and assessed to the relief of the poor.

*Ryde, K.C.*, and *Hyslop Maxwell*, for the appellants. Clause 8 of the lease is inconsistent with a bare licence without occupation. A power given to a licensee to add something to the building is inconsistent with retention of occupation by the licensor. Clause 17, which provides for the extra payments for the attendance of the Board's officers, is merely another form of payment of the rent. Clause 7 is not inconsistent with the rateable occupation of the respondents. The Board is in occupation of the hydraulic plant, and the respondents are in occupation of the premises in respect of the storage of the wines and spirits. An analogous case is that of occupation of flats where there is a lift. The decisions in *Allan* v. *Liverpool Overseers* and *Inman* v. *Kirkdale Overseers* (1) do not apply. They turned upon s. 64 of the Mersey Dock Acts Consolidation Act, 1858, whereas the lease in the present case was granted under the power contained in s. 82 of the Act. *Rochdale Canal Co.* v. *Brewster* (2) is distinguishable. In that case there was an unlimited right of access (clause 7 of the agreement) given to the Dock Board. In the present case it is only for specified purposes, and the premises are locked up, and there are brick walls separating them from the other warehouses. There is no clause in the present lease which is equivalent to clause 7 of the agreement in *Rochdale Canal Co.* v. *Brewster* (2), nor is s. 80 of the Mersey Dock Acts Consolidation Act, 1858, in question here. *London and North Western Ry. Co.* v. *Buckmaster* (3) is distinguishable. It was decided upon the ground that there was there merely an agreement to provide stall room for the four horses. The effect of the lease in the present case is that the respondents were given exclusive occupation of these premises. [*Electric Telegraph Co.* v. *Salford Overseers* (4) was also referred to.]

(1) L. R. 9 Q. B. 180.
(2) [1894] 2 Q. B. 852.
(3) (1874, 1875) L. R. 10 Q. B. 70, 444.
(4) (1855) 24 L. J. (M.C.) 146.

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*Rigby Swift*, for the respondents. The Dock Board have no power under the Mersey Dock Acts Consolidation Act, 1858, to divest themselves of the occupation which is vested in them by that Act: *Rochdale Canal Co.* v. *Brewster*. (1) The Board was created by virtue of the Mersey Dock Act, 1857, and ss. 49 and 50 of that Act describe the purposes and powers of the Board. They have no power to part with their occupation under those sections nor under ss. 49 to 102 of the Mersey Dock Acts Consolidation Act, 1858. Even if the Board have the power to divest themselves of their occupation, they have under the lease of May 29, 1907, reserved it, together with the control of the premises. The general scheme of the Mersey Dock Acts Consolidation Act, 1858, is that the control of the premises is to be retained by the Board. Under s. 64 of the Act of 1858 the only thing the Dock Company can do is to set aside and appropriate space. The position of the respondents is not so advantageous as regards control as that of a lodger. The Board use the premises every day and the respondents have no power to exclude them. It is true that the word "demise" is used in the lease, but that word does not have the effect of divesting the Dock Board of their permanent control.

*Ryde, K.C.*, in reply. The object of s. 64 of the Mersey Dock Acts Consolidation Act, 1858, is to enable the Dock Board to direct steamers to go to particular berths. It cannot have the same purview as s. 82, as that construction would give s. 82 no operation.

LORD ALVERSTONE C.J. This case raises important points. On behalf of the respondents it was contended that the Board have no power to deprive themselves of such occupation of these premises as would be consistent with the rateable occupation being in the respondents. But it seems to me that we cannot possibly decide the case upon that ground. In my opinion the cases of *Rochdale Canal Co.* v. *Brewster* (1) and *Allan* v. *Liverpool Overseers* (2), in which the powers of the Board were discussed, are inconsistent with the non-existence of that power. If the doubt expressed in the Divisional Court by Wright and

(1) [1894] 2 Q. B. 852. (2) L. R. 9 Q. B. 180.

Bruce JJ. in *Rochdale Canal Co.* v. *Brewster* (1) were well founded, I cannot help thinking that it would have received more attention in the Court of Appeal, and there would not have been the long discussion as to whether what was there done amounted to a licence or to a letting. This warehouse had been built by the Board under statutory powers. Many cases and instances might be referred to where a statutory company has been allowed to deal with property as an ordinary owner, to use its property for purposes as to which express powers have not been given, if such dealing with the property, or such user, is not inconsistent with the purposes for which the company was constituted. On behalf of the appellants it was contended that having regard to the provisions of the Act of 1858, and particularly to that part of it in which ss. 64, 80, and 82 occur, it would be inconsistent with the duties and obligations thrown upon the Board if they parted with their exclusive occupation and control of the premises. If I had come to the conclusion that rateable occupation by the respondents under the lease would be inconsistent with the purposes for which the Board were constituted or with the performance by the Board of their obligations and duties, I should have taken the same view as that held by the recorder, but I think, both upon principle and upon the authorities so far as they help us, this case cannot be decided upon the ground that the Board have no power to enter into such an agreement as would prevent their being the rateable occupiers, or to let some one else in as rateable occupiers.

We have therefore to consider what has been done. The property which is let is enclosed by walls, and it must be—having regard to the nature of the business carried on there—capable of being locked up and under the control of individuals other than the Board. It is probably not going too far to say that in the case of a bonded warehouse it must be under the control of the person who keeps his property—wines and spirits—there, and of His Majesty's Customs. Therefore the use to which this place is to be applied is inconsistent with the Board occupying the space for the general purposes of the dock. This differentiates the case at once from that of quays or berths which will remain

(1) [1894] 2 Q. B. 852; see 71 L. T. 243.

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open to the public—the quays during the time that the ships are alongside the berths, and the berths themselves when no ships happen to be in them. [Having stated the facts, his Lordship continued.] In these circumstances the Board on May 29, 1907, entered into the deed of that date, and it is contended by the appellants that having regard to that deed and the property let under it, and to the necessity of some user by the Board for certain limited purposes, the deed is consistent only with the view that the respondents were given and took under it such occupation as would make them rateable, the reservations or privileges given to the landlords or owners, the Board, being only such as would or might be given to or claimed by a landlord who desired to exercise a certain limited user of parts of the premises. It is contended by the respondents that the provisions are inconsistent with rateable occupation by them, and that they are consistent only with a licence, and that the character of the user by the Board officials from time to time, although of part only of the premises, shews that it was never intended that the respondents should—and that by the terms of the deed they did not—obtain rateable occupation.

Speaking for myself, I do not think that the question can be decided merely by reference to ss. 64 and 82 of the Mersey Dock Acts Consolidation Act, 1858. I can see a very plain reason why both s. 64 and s. 82 are necessary. Although I can conceive that occupation under a document purporting to be made under s. 64 might be such that the occupiers, though called licensees, might have a rateable occupation, I agree that s. 64 was in all probability intended and was necessary for a purpose which would ordinarily fall far short of anything like rateable occupation. I can equally appreciate that under s. 82 a number of arrangements might be authorized and made, and conditions imposed, which might be quite inconsistent with occupation for the purpose of rating. I doubt whether the determination of the present case depends upon the special language of either s. 64 or s. 82. I think it depends upon the powers of the Board to deal with the property lawfully constructed by them, assuming that they do not deal with it inconsistently with the purpose for which they have been created.

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The question we have to decide is what in the circumstances is the proper conclusion to be drawn from the deed and the occupation under it. In ordinary circumstances a demise of property would generally amount to creating a rateable occupation in the tenant. I do not base my opinion upon any particular words in this deed. The view I take is that its main purpose was to give exclusive occupation to persons who were going to occupy premises as a bonded warehouse, and in my opinion the nature of the business there to be carried on is not consistent with anything but exclusive occupation by those persons who store their bonded goods subject to the general control of the Customs and to the special control under the Mersey Dock Acts Consolidation Act, 1858. We ought not to draw any inference from the fact that there is a door which appears never to have been entered or used, of which the Board kept the key. It is quite plain that it would not be a door for the general use of the bonded warehouse, because it would not be under the control of the Customs. It may be a disused door and key. But it is important to observe with regard to the other means of access that the Board cannot get access to the premises without the consent of the tenant.

The effect of the agreement is that the exclusive occupation is prima facie in the tenant, subject to Customs control. In my judgment the clauses contained in the deed are consistent with a privilege being given to a landlord of using certain parts of the demised premises for a limited purpose, and rights given to him similar to those which are given where a landlord desires to protect his property. The position seems to me very analogous to that where a house is let in ordinary circumstances, containing a passage through to some private room or safe of the landlord which he does not desire to demise. He does not want to go to it regularly, and accordingly he reserves a right to go through the passage in the house and open the safe at reasonable times in order that he may avail himself of the use of that safe. That is the class of privilege here given to the landlord, which is in no way inconsistent with the exclusive occupation by the tenant.

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Clause 2 of the lease provides that the tenants are to pay all rates and taxes; but that does not shew who is to be the occupier; it is only a matter of arrangement. Clause 3 places upon the tenant the obligation of keeping the inside of the premises, and all erections, fixtures, and fittings thereon other than the hydraulic and other plant and machinery belonging to the Board, in good and tenantable repair. That is prima facie consistent with the premises being in occupation by the respondents. Clause 4 provides for their using the premises for the storage, blending, and manipulation of wines and spirits in bond; therefore they are to be used as a bonded warehouse. Clause 5 provides that the respondents are not to assign or sub-let or part with possession without consent in writing—the common restriction in favour of a landlord. The provision in clause 7 as to the Board being permitted by the respondents to view the condition of the premises is only what a landlord stipulates for where there is a covenant to repair. The right of the Board to overhaul and make good the Board's plant is incident to the fact that upon the premises there is machinery and there are machinery pits, the use of which was not intended to be given exclusively, if at all, to the tenants, and which necessitate a right of entry from time to time in order to repair. Clause 8 allows alterations to be made in accordance with the approved plans. That is the common privilege or stipulation with regard to that which a tenant may do subject to the approval of the plans by the landlord and is in no way inconsistent with an ordinary demise.

On behalf of the respondents reliance was placed on clause 11, which provides that they may not stow any goods at any time over the pipe trenches or machinery pits. It was said that the Board have under that clause a right to limit the floor space and direct where the goods are to be put. I quite agree that in ordinary circumstances such a provision might be inserted as necessary if the Board retained the general control of the premises, and it may fairly be said to be analogous to the provision in the agreements in *London and North Western Ry. Co.* v. *Buckmaster* (1), where it was held that there was no intention on

(1) L. R. 10 Q. B. 70, 444.

the part of the railway company to part with the general control of the premises. But in the present case there is the special privilege to the landlord of entering and using a particular part of the hereditament as to which he would ordinarily have no right of access, and as an alleyway has to be kept free, the provision does not seem to me at all inconsistent with the occupation of the respondents. It is only operative for the purpose of determining how much space it is necessary to exempt from the exclusive occupation of the tenant in order to give the landlord that privilege. As to clauses 12 and 13 it may well be that it is necessary that there should be certain restrictions for the general benefit of the undertaking as to what the respondents' employees may do with regard to the use of fires and lights and matters of that kind, such as the storage of dangerous goods. It is obvious that where there is a bonded warehouse great care is required. I do not think that the restrictions nor those contained in clause 23 are in any way inconsistent with the occupation of the premises being such as to make the respondents rateable. Clause 17 is against the respondents' contention. The clause recognizes that the premises are to be kept open after business hours, not by the Board, but by the respondents, who may wish to deal with the bonded spirits either before or after the ordinary time. That would necessitate the attendance over time of some of the Board's officers or servants, and it may also be of the police at the gates or other persons. That, in my judgment, is not only inconsistent with the general control of the premises being left with the Board, but it seems to me to provide for a burden which may be placed upon them by an excessive user of these particular premises by the respondents beyond the ordinary hours. The provision in clause 23, that the user of the premises "shall be so worked by the company as not to cause any interference with or obstruction to the general working of the dock estate and that the servants of the Board shall at all reasonable times have free access thereto for the purpose of such general working," is inserted to prevent these bonded warehouses being so used as to interfere with the general dock purposes, and accordingly to that extent there is control by the Board over the persons who

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are working upon the premises. That provision is, in my judgment, in no way inconsistent with the view I take. In my judgment the parties have agreed that the premises shall be demised with the limited privileges given to the landlords, and with such control over the occupation as shall keep absolutely uninterfered with the duties and obligations of the Board with regard to the premises.

In the view I take of this case the authorities do not materially help us. *Allan* v. *Liverpool Overseers* and *Inman* v. *Kirkdale Overseers* (1) were entirely different cases from the present one. There quay spaces and berths were being dealt with, and, although it is quite true that in *Allan* v. *Liverpool Overseers* (1) there was an office, the judgment of Blackburn J. shews that the office, consisting of three or four rooms, was only ancillary to the berth or quay space, and could not be regarded as a separate occupation for the purpose which the Court was there considering. With regard to *London and North Western Ry. Co.* v. *Buckmaster* (2) we are bound by the decision of the Court, although there was equality of opinion when the question was before the Court of Appeal. The ratio decidendi in that case was that the Court came to the conclusion that the railway company never meant to give up the actual control and management of the stables and the coal stores to which the stables were merely ancillary.

I therefore come to the conclusion that the nature of this letting, and the agreement which carries it into effect, is consistent only with exclusive occupation being given to the respondents for the purposes of their trade, and that the privileges given to the landlords are only occasioned by the fact that there was upon the demised property machinery that the Board wished to utilize during the time. With great respect to the opinion of the recorder, and quite recognizing the grounds on which he came to a different conclusion, I am of opinion that on the proper inference to be drawn from the facts the respondents were in rateable occupation of these premises, and the appeal must be allowed.

(1) L. R. 9 Q. B. 180. (2) L. R. 10 Q. B. 70, 444.

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HAMILTON J. I entirely agree. In determining the question which arises here, whether the respondents had exclusive occupation of these premises or only a licence to use them subject to the control of the Board, we have three classes of material—first, the nature of the business carried on, and the purpose for which the respondents were placed in possession of the premises; secondly, the instrument itself and its terms; and thirdly, the state of the facts with regard to the buildings and the user of them. From the nature of the use to which the premises were put as a bonded warehouse one would expect an exclusive occupation to be created in the merchant who is to have the benefit of the store. With regard to the instrument itself it uses the term "demise." No doubt the parties cannot by the mere use of a term of art alter the truth, but prima facie where the parties have demised the premises they intend to give exclusive occupation to the tenant. It was contended on behalf of the respondents that here it must be otherwise because the Board has no power to demise portions of the estate which is vested in it. In my opinion that objection fails. Whether in the exercise of common law powers as owner of property, or by s. 39 of the Mersey Docks (Corporation Purchase) Act, 1861, the Board has power to let the premises, as it purported to do. In these circumstances it ceases to be material to ask whether this lease was granted under s. 64 or under s. 82 of the Mersey Dock Acts Consolidation Act, 1858, except for the purpose of considering whether *Allan* v. *Liverpool Overseers* and *Inman* v. *Kirkdale Overseers* (1) and *Rochdale Canal Co.* v. *Brewster* (2) are in point. As soon as one appreciates that in those cases the Board was exercising its powers of appropriating—for the occupation of particular traders exclusive of other traders but not of the servants of the Board—portions of the quay space, it is clear that they were decided under s. 64 of the Act of 1858, and the judgments therefore do not either bind or very much assist us in the determination of the present case. The language of the lease we are considering seems in every respect to be more consistent with the vesting of an exclusive occupation in the merchant than with a bare licence subject to the

(1) L. R. 9 Q. B. 180. (2) [1894] 2 Q. B. 852.

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Board's control. Covenants are no doubt taken by which the respondents are bound to allow the officials of the Board to do certain things, but the very fact that covenants are taken to allow control as to particular matters points to there being no general right of control reserved in the lessors. There was no need to bind the respondents to observe rules and regulations with regard to fires and lights, if the officials of the Board had the right to enter and turn out the lights or extinguish the fires whenever it might be necessary. Nor was there any need for the arrangement, which it seems exists in fact, that the respondents should give the use of the keys so that the Board's servants may enter the premises at all reasonable times, if the Board had the right of entry at all times. Some of the covenants are no doubt special, though others are of a most ordinary kind, but they all appear to be founded on the same principle. There is a covenant to repair modified by express permission to the tenant to alter the premises, and a covenant to allow entry to view the state of the premises. It is suggested that those words point to a mere licence to use the premises subject to the Board's control, but I do not take that view, and the other covenants, namely, to pay the Board's officers by time, to allow the Board to run telegraph and telephone wires in various directions, and to allow the servants of the Board at all reasonable times free access for the purpose of the general working of the dock estate, are all covenants which are of the same nature as the covenant to allow entry to view the state of the premises at all reasonable times and have no more significance, as it seems to me, than an ordinary covenant would have.

There is no fact with regard to the buildings of any importance, unless it be the finding that in order to use the machinery in the machinery pits the employees of the Board are allowed to go down into the vaults several times a day and stay there for periods ranging from ten minutes to the whole day according to the amount of work to be done, and that the respondents must leave for the use of the Board, and persons authorized by it, free access to the hydraulic mains and machinery, and that in order to secure such access an alleyway has to be

always kept clear of goods. I may point out that it is not necessarily always the same space which is to be used as an alleyway, and provided there is some clear access the goods may be piled as the respondents like. The circumstance that the employees of the Board go down to work the cranes and lifts for persons other than the respondents only shews that they are permitted to make a particular use of portions of machines which structurally have their working parts within the demised area.

It appears to me, therefore, that all three classes of materials before us point to the same conclusion, although not that at which the learned recorder arrived, and that the Board has vested in the respondents an occupation which makes them rateable.

AVORY J. I am of the same opinion. It is clear that either the Board or the respondents are rateable as the occupiers of these premises. Until the year 1909 the Board had been rated as the occupier, but upon the lease of 1907 coming to the notice of the overseers they placed the respondents upon the list of occupiers, and in my judgment they have properly done so. If in these circumstances the Board had remained upon the list and objection had been taken that they were no longer in exclusive occupation of these premises, I cannot help thinking that it must have been decided, upon the terms of the lease being brought to the notice of any Court, and the character of the business which is carried on by the respondents being proved, that the Board are no longer in exclusive occupation, and if this is so it follows that the respondents are in occupation. The terms of the lease, in my opinion, establish an exclusive occupation. The word "demise" prima facie alone would be sufficient to establish that. I do not go so far as to say that where the word "demise" is used in a lease or agreement no evidence would be admissible to displace the presumption arising from its use, but the word prima facie would establish an exclusive occupation. And it is to be observed that that word is not to be found in the agreements in *Allan* v. *Liverpool Overseers* and *Inman* v. *Kirkdale Overseers* (1) or *Rochdale Canal Co.* v. *Brewster*. (2) In those cases it

(1) L. R. 9 Q. B. 180. (2) [1894] 2 Q. B. 852.

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seems to have been assumed by the Court that the use of the word "demise" would have made a difference, because I find in the *Rochdale Case* (1) that Mr. Poland, who was arguing against there being any exclusive occupation, said that the clause of the agreement in that case shewed that there was not a demise but merely an appropriation of a particular portion of the dock, and Quain J. in *Allan* v. *Liverpool Overseers* (2) said that the arrangement in that case appeared not to be "a letting or a demise." I agree with the other members of the Court that the special covenants which are to be found in this lease are merely covenants reserving rights to the landlord which otherwise must be deemed to have been given to the tenant, and in my opinion the language of Lord Herschell L.C. in giving judgment in *Holywell Union Assessment Committee* v. *Halkyn Drainage Co.* (3) applies here. He said: "In the present case, in my opinion, on the true construction of the deed the possession of the respondents"—that is the Halkyn Drainage Company, who in that case were held rateable—"is paramount, and any rights which the landlord has are subordinate." I think that exactly expresses the position of the parties here.

In my judgment, however, apart from the terms of this lease, the nature of the business carried on upon the premises involves exclusive occupation on the part of the respondents. To this it was objected—and I confess that for some time the objection created some difficulty in my mind—that the Board had in fact no power to make, and would be acting ultra vires in making, any grant of exclusive occupation of any part of these premises. I think the answer to that objection is, first, that there appears to be no section of their special Acts which shews that the grant would be inconsistent with their statutory powers; and, secondly, neither in *Allan* v. *Liverpool Overseers* (2) nor in *Rochdale Canal Co.* v. *Brewster* (1) did the Court so decide. In *Rochdale Canal Co.* v. *Brewster* (1) the point was expressly brought to the notice of the Court of Appeal as being one of the grounds on which the Divisional Court had decided the case, and I cannot help thinking that so great a

(1) [1894] 2 Q. B. 852. (2) L. R. 9 Q. B. 180.
(3) [1895] A. C. 117.

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master of that branch of the law as Lindley L.J. would have dealt with it if it had commended itself to him. He in fact did not notice it in his judgment, and although there are expressions used by Blackburn J. in his judgment in *Allan* v. *Liverpool Overseers* (1) intimating that this question might possibly have to be argued in future, having heard it argued, I am not convinced that the Board were in any way acting ultra vires in granting—as I think they have—the exclusive occupation to the respondents.

*Appeal allowed.*

Solicitors for appellants: *Wynne & Sons, for T. J. Smith & Son, Liverpool.*

Solicitors for respondents: *Pritchard & Sons, for Collins, Robinson, Driffields & Kusel, Liverpool.*

J. E. A.

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1911

*March* 21.

HILL (ON BEHALF OF THE DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION FOR IRELAND), APPELLANT *v.* THE PHŒNIX VETERINARY SUPPLIES, LIMITED, RESPONDENTS.

*Adulteration—Fertilisers and Feeding Stuffs—Offence—Article sent to Purchaser in Ireland—Prosecution in England by Department of Agriculture and Technical Instruction for Ireland—Necessity for Consent of Board of Agriculture—Fertilisers and Feeding Stuffs Act*, 1906 (6 *Edw.* 7, c. 27), *ss.* 6, 12.

By s. 1, sub-s. 2, of the Fertilisers and Feeding Stuffs Act, 1906, a person who sells for use as food for cattle any article which has been artificially prepared shall give to the purchaser an invoice containing certain particulars. By s. 6, sub-s. 1 (*a*), if he fails without reasonable excuse to give the invoice required by the Act, he shall be liable to a fine; and by sub-s. 3, "a prosecution for an offence under this section shall not be instituted except with the consent of the Board of Agriculture and Fisheries, and the Board shall not give such consent until the part of the sample retained by the agricultural analyst has been analysed, and a certificate of analysis given, by the chief analyst."

(1) L. R. 9 Q. B. 180.

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By s. 12, "For the purposes of the execution of this Act in Ireland . . . . the Department of Agriculture and Technical Instruction for Ireland shall be substituted for the Board of Agriculture and Fisheries . . . . and for the purpose of instituting prosecutions the said Department may take samples of any articles to which this Act applies which have been sold or are kept or exposed for sale."

The respondents in England sent to a purchaser in Ireland an article as food for cattle, and were prosecuted in England by the Department of Agriculture and Technical Instruction for Ireland, which had taken a sample of the article in Ireland and had it analysed there, for having failed without reasonable excuse to give to the purchaser an invoice as required by the Act. The consent of the Board of Agriculture and Fisheries to the institution of the prosecution had not been obtained:—

*Held*, that the consent of the Irish Department to the institution of the prosecution was not sufficient, but that the consent of the Board of Agriculture and Fisheries was necessary.

CASE stated by the acting stipendiary magistrate for the city of Birmingham.

On August 4, 1910, the appellant, on behalf of the Department of Agriculture and Technical Instruction for Ireland, laid an information and thereupon a summons was issued against the respondents, who were a limited company dealing in cattle foods in Birmingham, for that they on March 10, 1910, in Birmingham, having sold and delivered to one Honora Hannan, of Kilfree, Gurteen, Ballymote, in the county of Sligo, Ireland, for use as food for cattle an article, to wit, one and a half hundredweight of calf meal, which had been artificially prepared, did unlawfully fail without reasonable excuse to give to the said Honora Hannan, the purchaser, on or before or as soon as possible after the delivery of the said article an invoice, as required by the Fertilisers and Feeding Stuffs Act, 1906, stating the name of the article and whether it had been prepared from one substance or seed, or from more than one substance or seed, and what were the percentages of oil and albuminoids contained in the said article. The summons was issued under s. 6, sub-s. 1 (*a*), of the Act.

At the hearing, a preliminary objection was taken on behalf of the respondents to the magistrate's jurisdiction upon the ground that the consent of the Board of Agriculture and Fisheries to the prosecution had not been obtained as required by s. 6, sub-s. 3,

of the Fertilisers and Feeding Stuffs Act, 1906. (1) It was admitted on the part of the appellant that this consent had not been obtained, and it was admitted on behalf of the respondents that the calf meal had been consigned by them in Birmingham to the purchaser in Ireland. (2)

It was contended on behalf of the respondents in support of the objection that if the offence had been committed in Ireland the proceedings could have been commenced there by the Department of Agriculture and Technical Instruction for Ireland, but that the last-mentioned Department, before taking out a summons for an offence alleged to have been committed in England, were bound by s. 6, sub-s. 3, of the Act to obtain the consent of the Board of Agriculture and Fisheries to the institution of the proceedings.

The magistrate was of opinion that the contention of the respondents was correct. He pointed out that by s. 12 the Department of Agriculture and Technical Instruction for Ireland was substituted for the Board of Agriculture and Fisheries only for the purposes of the execution of the Act in Ireland, and he held that the proceedings before him amounted to an execution of the Act in England, and he dismissed the summons for want of jurisdiction.

(1) 6 Edw. 7, c. 27, s. 6, sub-s. 3: "A prosecution for an offence under this section shall not be instituted except with the consent of the Board of Agriculture and Fisheries, and the Board shall not give such consent until the part of the sample retained by the agricultural analyst has been analysed, and a certificate of analysis given, by the chief analyst."

Sect. 12: "For the purposes of the execution of this Act in Ireland, inclusive of the appointment of a chief agricultural analyst, the Department of Agriculture and Technical Instruction for Ireland shall be substituted for the Board of Agriculture and Fisheries, and in section 17 of the Agriculture and Technical Instruction (Ireland) Act, 1899, a reference to sections six, seven, and eight of this Act shall be substituted for the reference to section 7 of the Fertilisers and Feeding Stuffs Act, 1893; and for the purpose of instituting prosecutions the said Department may take samples of any articles to which this Act applies which have been sold or are kept or exposed for sale."

(2) It was stated by counsel on the hearing of the appeal and taken as an admitted fact that a sample of the article was taken in Ireland by the Department of Agriculture and Technical Instruction for Ireland and was analysed there.

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The question for the opinion of the Court was whether the decision of the magistrate was right.

*H. H. Joy*, for the appellant. The consent of the Board of Agriculture and Fisheries under s. 6, sub-s. 3, of the Fertilisers and Feeding Stuffs Act, 1906, is not a condition precedent to the institution of a prosecution by the Department of Agriculture and Technical Instruction for Ireland for an offence under that section. By s. 9, subject to the provisions of the Act as to the consent of the Board of Agriculture, a prosecution for an offence under the Act may be instituted either by the person aggrieved, or by the council of a county or borough, or by any body or association authorized in that behalf by the Board; and by s. 12, for the purposes of the execution of the Act in Ireland the Department of Agriculture and Technical Instruction for Ireland is substituted for the Board of Agriculture. The Department of Agriculture and Technical Instruction for Ireland was established by the Agriculture and Technical Instruction (Ireland) Act, 1899 (62 & 63 Vict. c. 50), and by s. 2, sub-s. 1 (*b*), the powers and duties of the Lord Lieutenant under the Fertilisers and Feeding Stuffs Act, 1893 (now repealed), were transferred to the Department; and by s. 17 the Department may take such steps as they think proper for instituting prosecutions under s. 7 of the Fertilisers and Feeding Stuffs Act, 1893 (now ss. 6, 7, and 8 of the Fertilisers and Feeding Stuffs Act, 1906). Under s. 6, sub-s. 3, of the Act of 1906, the part of the sample which has been retained by the agricultural analyst must be analysed before the consent of the Board is given to a prosecution. The article having been received by the purchaser in Ireland, the sample would be taken and analysed there, and all the steps preliminary to the prosecution would be taken in Ireland. It is only because the respondents are a company resident in England that there are no means, under the Summary Jurisdiction Acts, of serving them in England with a summons taken out in Ireland and prosecuting them in Ireland. It is necessary, therefore, to prosecute in England, but that does not make it necessary to obtain the consent of the Board of Agriculture to such a prosecution. The words "For the purposes of the execution of

this Act in Ireland" in s. 12 must be read in connection with the later words in the same section, "for the purpose of instituting prosecutions," and these latter words mean that for the purpose of taking all the preliminary steps necessary to a prosecution for an offence, including the consent required by s. 6, sub-s. 3, the Irish Department is substituted for the Board of Agriculture, but there is nothing in the Act dealing with the place where the prosecution is to be instituted. The Irish Department and the Board of Agriculture are of equal authority, and the Act cannot have intended that the Irish Department, which knows all the facts of the case, should go through the form of applying to the Board of Agriculture, which knows nothing of the facts, for its consent to a prosecution in England. The Act applies to the United Kingdom, and the place where the prosecution is instituted is not material. Sect. 4, which gives the Board of Agriculture power to make regulations "for the purpose of carrying this Act into execution," refers to departmental or administrative matters. The same meaning ought to be given to the somewhat similar words in s. 12, "for the purposes of the execution of this Act in Ireland," and thus they refer solely to the necessary preliminary steps leading up to a prosecution, wherever it may be. The Irish Department is the authority which has to give its consent to this prosecution, and having done so, the objection fails.

*W. Marshall Freeman*, for the respondents. The prosecution was instituted under s. 6, sub-s. 1 (*a*), of the Fertilisers and Feeding Stuffs Act, 1906, for having failed to give an invoice as required by the Act. That was an offence committed in England. The Act has given certain powers to the Board of Agriculture in England and Scotland, and when the Legislature applies the Act to Ireland it expressly says in s. 12 that "for the purposes of the execution of this Act in Ireland" the Department of Agriculture and Technical Instruction for Ireland shall be substituted for the Board of Agriculture. The institution of a prosecution and giving consent thereto are part of the execution of the Act, and when a prosecution is thought desirable in England the consent of the Board of Agriculture must be obtained under s. 6, sub-s. 3. A prosecution in England is not part of "the execution of this

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Act in Ireland." The clause at the end of s. 12, upon which reliance has been placed on behalf of the appellant, was inserted for the purpose of giving to the Irish Department larger powers as to taking samples than are conferred upon the Board of Agriculture. The Board of Agriculture and the Irish Department have sole authority within their respective areas, and there is no difficulty in obtaining the consent of the Board of Agriculture in a proper case. The magistrate was therefore right.

*Joy* in reply.

LORD ALVERSTONE C.J. The magistrate has dismissed a summons taken out under s. 6, sub-s. 1 (*a*), of the Fertilisers and Feeding Stuffs Act, 1906, against the respondents, charging them with having unlawfully failed without reasonable excuse to give to the purchaser of certain calf meal in Ireland an invoice as required by s. 1, sub-s. 2, of the Act, upon the ground of want of jurisdiction, the prosecution not having been instituted with the consent of the Board of Agriculture and Fisheries. The respondents are a company resident in Birmingham, and they sent the calf meal from Birmingham to the purchaser in Ireland, where it was received and where the sample would naturally be taken and analysed. It is said that, inasmuch as all the steps preliminary to the prosecution would be taken in Ireland, the consent of the Department of Agriculture and Technical Instruction for Ireland was alone necessary for the institution of the prosecution, and that, as that Department had not only sanctioned but directed the prosecution, the magistrate had jurisdiction to entertain the summons. The question turns upon the combined effect of ss. 6 and 12 of the Act. By s. 6, sub-s. 3, "a prosecution for an offence under this section shall not be instituted except with the consent of the Board of Agriculture and Fisheries," and then follows this somewhat curious provision, that "the Board shall not give such consent until the part of the sample retained by the agricultural analyst has been analysed, and a certificate of analysis given, by the chief analyst." At first sight it seems a little difficult to see why an analysis of the sample is required where the offence charged is for failing to give an invoice at all, but the reason may probably be that the

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requirement is only one step in the prevention of the sale of articles which are not of the proper standard of quality, and it is only when the analysis discloses that the article sold is not of the proper quality that a prosecution will be sanctioned. I do not say that the Irish Department was not the proper body in this case to take a sample of the article sold and to have the analysis made. The only question before us is whether, where a sample of the article sold is taken in Ireland and is analysed there, the Irish Department is the proper body to give its consent to the institution of this prosecution in England. That depends upon s. 12 of the Act, which provides that "for the purposes of the execution of this Act in Ireland, inclusive of the appointment of a chief agricultural analyst, the Department of Agriculture and Technical Instruction for Ireland shall be substituted for the Board of Agriculture and Fisheries." There are many things to which those words are applicable. They include, besides the appointment of a chief agricultural analyst, the approval of the appointment of agricultural analysts, the making of regulations under s. 4 of the Act, and other powers and duties which flow from the fact that the Department is in Ireland substituted for the Board of Agriculture. Reliance is placed on behalf of the appellant upon the last clause in s. 12, "and for the purpose of instituting prosecutions the said Department may take samples of any articles to which this Act applies which have been sold or are kept or exposed for sale," and it is said that it was intended that the body which has to take the sample and have it analysed must be the body which has to determine whether a prosecution shall or shall not follow. It is said, on the other hand, that those words are inserted for the purpose of giving to the Irish Department a somewhat larger power than that which is possessed by the Board of Agriculture, and that they were not intended to deal with the question of giving consent to the institution of prosecutions. If that is so, there is a reason for the insertion of those words quite apart from the suggestion put forward on behalf of the appellant. The Act is drafted as having reference primarily to England and Scotland, and therefore in dealing with its application to Ireland it is necessary to specify some authority which is to have control of the execution of the Act and of the

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institution of prosecutions there. That jurisdiction does not extend to prosecutions in England. In my opinion the magistrate was right in holding that for the purpose of a prosecution in England the consent of the Board of Agriculture is necessary. It is said that this would make the Irish Department subordinate to the Board of Agriculture, as the former would have to ask the consent of the latter to the institution of a prosecution in England. But exactly the same would happen, only the position would be reversed, if the sample and analysis were taken in England and the prosecution was in Ireland. There seems to me therefore to be no weight in that argument. If the Irish Department, after having taken the sample and had it analysed, had communicated the facts to the Board in England, the latter would, no doubt, have readily given their consent to the institution of this prosecution. The magistrate had therefore no jurisdiction to entertain the summons, and the appeal must be dismissed.

RIDLEY J. I am of the same opinion. Sect. 12 of the Fertilisers and Feeding Stuffs Act, 1906, makes provision for the operation of the Act in Ireland, and for the purposes of the execution of the Act in Ireland, including the appointment of a chief agricultural analyst, the Irish Department is substituted for the Board of Agriculture. It is difficult to say that those words are wide enough to include the power to give consent to a prosecution in England. It is contended that in a case such as the present the Irish Department has co-ordinate authority with the Board of Agriculture to consent to the institution of the prosecution in England. I do not agree. Though the Irish Department has control of the antecedent steps in Ireland, where there is an offence for which a prosecution is necessary in England the consent of the Board of Agriculture must be obtained before the prosecution can be instituted. The last clause of s. 12, upon which reliance has been placed, is not sufficient to confer on the Irish Department the power to give or withhold consent to a prosecution in England. The prosecution in England seems to me to be part of the execution of the Act in England, and the consent of the Board of Agriculture is required.

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CHANNELL J. I am of the same opinion. The words of the Act are much too strong to allow us to place any other interpretation upon it than that which we are now doing. The language of the Act clearly points to this, that in all proceedings in England the Board of Agriculture is the supreme authority, and in all proceedings in Ireland the Irish Department is the supreme authority, including the power to give consent to the institution of prosecutions in the respective countries.

*Appeal dismissed.*

Solicitor for appellant: *J. E. Hill, Birmingham.*
Solicitor for respondents: *W. H. Stoddard, Birmingham.*

W. F. B.

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## BOARD OF TRADE *v.* ANGLO-AMERICAN OIL COMPANY, LIMITED.

1911
*March* 16, 20.

*Ship—Distressed Seaman—Illness being Venereal Disease—Seaman left behind from Ship in Place out of United Kingdom—Expenses of necessary Medical and Surgical Advice and Maintenance—Liability of Shipowner—Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *ss.* 32, 34, 35, 41, 42.

Under ss. 41 and 42 of the Merchant Shipping Act, 1906, the Board of Trade on behalf of the Crown is entitled to recover from the owner of a British ship the expenses incurred on behalf of the Crown of maintenance in the sense of board and lodging and conveyance home of a seaman left behind from the ship in a place out of the United Kingdom and in distress in that place, though suffering from venereal disease, but it cannot recover any medical or surgical expenses of the seaman.

ACTION tried before Scrutton J. without a jury.

The plaintiffs claimed to recover from the defendants, the Anglo-American Oil Company, Limited, the sum of 25*l.* 2*s.* 3*d.* for expenses incurred on behalf of the Crown under ss. 41 and 42 of the Merchant Shipping Act, 1906 (1), on account of one George

(1) Merchant Shipping Act, 1906, s. 32, sub-s. 1: "Where the service of a seaman belonging to a British ship terminates at a port out of His Majesty's dominions otherwise than by the consent of the seaman to be discharged during the currency of the agreement, the master of the ship shall . . . . make adequate provision in accordance with this

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Crawford, a distressed seaman. By order of a Master made upon a summons for directions the action was tried upon the following agreed statement of facts.

The defendants were the owners of the s.s. *Genesee*, a British

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Act for his maintenance and for his return to a proper return port . . . ."

Sect. 34, sub-s. 1: "If . . . . a seaman belonging to a ship . . . . suffers from any illness (not being venereal disease, or an illness due to his own wilful act or default or to his own misbehaviour), the expense of providing the necessary surgical and medical advice and attendance and medicine, and also the expenses of the maintenance of the . . . . seaman until he is cured, or dies, or is returned to a proper return port, and of his conveyance to the port . . . . shall be defrayed by the owner of the ship, without any deduction on that account from his wages."

Sub-s. 2: "If the . . . . seaman is on account of any illness temporarily removed from his ship for the purpose of preventing infection, or otherwise for the convenience of the ship, and subsequently returns to his duty, the expense of the removal and of providing the necessary advice and attendance and medicine, and of his maintenance while away from the ship, shall be defrayed in like manner."

Sub-s. 3: "The expense of all medicines, surgical and medical advice, and attendance, given to a . . . . seaman whilst on board his ship shall be defrayed in like manner."

Sub-s. 4: "In all other cases any reasonable expenses duly incurred by the owner for any seaman in respect of illness . . . . shall, if duly proved, be deducted from the wages of the seaman."

Sect. 35, sub-s. 1: "If any of the expenses attendant on the illness . . . . of a seaman, which are to be paid under the Merchant Shipping Acts by the . . . . owner, are paid by any authority on behalf of the Crown, or if any other expenses in respect of the illness . . . . of any seaman whose wages are not accounted for under the Merchant Shipping Acts to that authority, are so paid, those expenses shall be repaid to the authority by the master or owner of the ship."

Sub-s. 2: "If the expenses are not so repaid, the amount thereof shall with costs be a charge upon the ship, and be recoverable from the master or from the owner of the ship for the time being . . . . as a debt to the Crown, either by ordinary process of law or in the Court and in the manner in which wages may be recovered by seamen."

Sect. 41, sub-s. 1: — "Where . . . . —

"(*a*) any seamen, whether subjects of His Majesty or not, are found in any place out of the United Kingdom, and . . . . by reason of having been discharged or left behind from any such ship in any place out of the United Kingdom, are in distress in that place . . . . the proper authority as defined for the purpose in this Part of this Act may, and, if not a merchant, shall, in accordance with and on the conditions prescribed by the distressed seamen regulations, provide in accordance with this Act

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ship. On July 6, 1907, at Manchester, Crawford, a subject of His Majesty, signed on the s.s. *Genesee* as an A.B. at 4*l.* 10*s.* a month for a voyage from Manchester and/or any ports or places in the United Kingdom to New Orleans and Galveston and/or any ports or places within the limits of 75 degrees north and 60 degrees south latitude trading as may be required within such limits and back to a final port of discharge in the United Kingdom, and in accordance with the terms of the agreement was duly on board on July 8, 1907.

On July 9, 1907, the s.s. *Genesee* left Partington and, after touching at Newport News on the 26th—27th of the same month, arrived at New Orleans on August 4, 1907.

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for the return of those seamen (who are in this Act included in the term distressed seamen) to a proper return port, and also provide for their necessary clothing and their maintenance until their departure for such a port, and, in addition, in the case of shipwrecked seamen for the repayment of any expenses incurred in their conveyance to port after their shipwreck, and their maintenance while being so conveyed."

Sect. 42: "Where any expenses (other than excepted expenses as defined by this section) are incurred by or on behalf of the Crown . . . . on account of a distressed seaman, either for his maintenance, necessary clothing, conveyance to a proper return port . . . . or otherwise in accordance with this Act, those expenses (together with the wages, if any, due to the seaman) shall be a charge upon the ship, whether British or foreign, to which the distressed seaman belonged, and shall be a debt to the Crown from the master of the ship, or from the owner of the ship for the time being . . . ."

Sub-s. 2: "The debt, in addition to any fines which may have been incurred, may be recovered by the Board of Trade, on behalf of the Crown, either by ordinary process of law or in the Court and manner in which wages may be recovered by seamen."

Sub-s. 4: "For the purpose of this section, excepted expenses are expenses incurred in cases where the certificate of the proper authority obtained on leaving a seaman behind states, or the Board of Trade are otherwise satisfied, that the cause of the seaman being left behind is desertion, or disappearance, or imprisonment for misconduct, or discharge from his ship by a naval court on the ground of misconduct, and expenses incurred on account of the return to a proper return port of a distressed seaman who has been discharged at the port at which he was shipped, or at some neighbouring port."

Sect. 49, sub-s. 1: "For the purposes of this Part of this Act, unless the context otherwise requires,—

"The expression 'proper authority' means—

"(*a*) as respects a place out of His Majesty's dominions, the British consular officer . . . ."

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On August 5, 1907, Crawford was found to be suffering from venereal disease, and on the doctor's recommendation was removed to the hospital. Crawford was by reason of the disease unfit to discharge the duties of a seaman, and was without means save that there was due to him from the defendants $20·61 for wages, which sum was handed on behalf of the defendants to His Majesty's Consul.

Crawford remained an inmate of the hospital from August 5 until his discharge on November 14, 1907, and was thereupon by order of His Majesty's Consul sent to Liverpool per s.s. *Chancellor*. It was necessary and proper that Crawford should remain in the hospital for the time mentioned, and it would not have been reasonable or practicable to have maintained him outside the hospital, or to have provided for his return to a proper return port without or before going to hospital. The plaintiffs through His Majesty's Consul have incurred the following expenses in respect of the above matters:—

PARTICULARS.

| | | | |
|---|---|---|---|
| August 5 to November 13, 1907— | | | |
| Hospital expenses at Tonro Infirmary, New Orleans, at $1·25 per day ... | $126·25 | | |
| November 13, 1907— | | | |
| Disbursement for medical comfort ... | 1·00 | | |
| | 127·25 | | |
| Less wages deposited with H. B. M. Consul ... ... ... ... | 20·61 | | |
| | | $106·64 | |
| November 13, 1907— | | | |
| Drayage on baggage from infirmary to ship ... ... ... ... ... | | ·50 | |
| Cab fare from infirmary to ship ... | | ·20 | |
| | | $107·34 | |
| At exchange $4·86¾ to the £ ... ... | | £22 2 3 | |
| December 6, 1907— | | | |
| Passage money per s.s. *Chancellor* ... | | 3 0 0 | |
| Total ... ... ... ... | | £25 2 3 | |

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*Sir Rufus D. Isaacs, A.-G., Sir J. A. Simon, S.-G.,* and *S. A. T. Rowlatt,* for the plaintiffs. The question turns upon the true construction of ss. 41 and 42 of the Merchant Shipping Act, 1906. No distinction is made in those sections as to the causes of the expenses incurred in respect of distressed seamen, and it is therefore immaterial whether the expenses were occasioned by venereal disease or not. There is a reference to this matter in s. 34, but that does not affect the absolute obligation upon the defendants under ss. 41 and 42 to bear the expenses, and they are therefore liable to the plaintiffs in this action.

*Bailhache, K.C.,* and *Dawson Miller,* for the defendants. The defendants admit that Crawford was a distressed seaman. But ss. 41 and 42 of the Merchant Shipping Act, 1906, must be read together with ss. 32 and 34, and a construction has to be put upon those sections which will make them harmonize. Sect. 34 contains a complete code which covers the liability of the shipowner where a seaman who is ill has been left behind by the master. The result is that ss. 41 and 42 must be read as subject to the exemptions of the owner from liability in the cases mentioned in ss. 32 and 34, i.e., if the seaman is discharged by consent or is suffering from venereal disease. In those cases, therefore, there is no liability on the owner under ss. 41 and 42. The words "not being venereal disease, or an illness due to his own wilful act or default, or to his own misbehaviour" were not in the Merchant Shipping Act, 1894, and it must therefore have been the intention of the Legislature that owners should by s. 34 of the Act of 1906 be exempted from liability in those cases.

Even if the defendants are liable for the maintenance of the seaman, that does not include anything in the nature of medical expenses. The express provision contained in s. 35 for the recovery by the Board of Trade of medical expenses only extends to those expenses for which the owner is liable.

*Sir Rufus D. Isaacs* in reply. Sect. 41 of the Merchant Shipping Act, 1906, does not deal with the case of a seaman discharged by consent. In that case the voyage is at once at an end so far as the seaman is concerned. Medical attendance is part of the "maintenance" which the owner is liable to provide under s. 41. The only exceptions to the liability of the owner

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under ss. 41 and 42 are those mentioned in sub-s. 4 of s. 42, which do not include expenses due to illness caused by venereal disease. Sect. 34 deals with a different state of circumstances to those contemplated by ss. 41 and 42. Sect. 34 deals with the case of a seaman ill but not distressed. Sects. 41 and 42 deal with the case of a seaman who is distressed but not necessarily ill. [*Halliday* v. *Taffs* (1) was referred to.]

*Cur. adv. vult.*

March 20. The following judgment was read by

SCRUTTON J. This action was brought by the Board of Trade to recover a sum of 25*l.* 2*s.* 3*d.* from the owners of the steamer *Genesee* in respect of the hospital expenses of a sailor, George Crawford, left behind by the *Genesee* at New Orleans, and the cost of his return to this country. The action was tried on an agreed statement of facts which I summarize thus: Crawford, being on board the *Genesee* on a round voyage from the United Kingdom to New Orleans and back to the United Kingdom, was on August 5, 1907, while at New Orleans, found to be suffering from venereal disease and removed to the hospital on shore, being unfit by reason of his complaint to discharge the duties of a seaman. He necessarily remained in the hospital from August 5 to November 14, 1907, incurring what are described as "hospital expenses" of 1 dollar 25 cents a day. As soon as his health permitted he was returned by the Consul to England. Wages were due to him of 20 dollars 61 cents. These were applied to defray the expenses of hospital and conveyance home, and the balance unpaid, amounting to 25*l.* 2*s.* 3*d.*, was the claim of the Crown against the shipowner in this action. It was agreed that the seaman was without means, and Mr. Bailhache, for the shipowners, admitted he was a distressed seaman within the meaning of the Acts.

The Attorney-General, for the Board of Trade, rested his case on ss. 41 and 42 of the Merchant Shipping Act, 1906. He said that the seaman was left behind from a British ship in a place out of the United Kingdom and was in distress in that place; that it thereupon became the duty of the

(1) [1911] 1 K. B. 594.

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Consul to provide for his return to a proper return port, and for his necessary clothing and maintenance until his departure to such a port. He contended that "maintenance" included "hospital expenses." He further relied on the power given under s. 42 to recover expenses for maintenance, necessary clothing, and conveyance to a return port from the shipowner except in certain cases specified in sub-s. 4, which cases do not include expenses caused by illness of the seaman whether brought on by his own misconduct or not.

On behalf of the defendants it was contended that the shipowner's liability in case of illness of the seaman is to be found in ss. 34 and 35 of the Act. The argument based upon those sections was in substance as follows. Sect. 34 deals with four classes of illness of seamen, in three of which the owner is to defray the expenses without any deduction from the seaman's wages. The first of these three cases specifically excludes "venereal disease, or an illness due to" the seaman's "own wilful act or default or to his own misbehaviour." The fourth case, namely, "in all other cases," provides that if the owner without legal liability incurs medical expenses he may deduct them from the wages. Sect. 35 provides that in cases where the Crown pays expenses attendant on illness "which are to be paid under the Merchant Shipping Acts by the . . . . owner," the owner shall repay such expenses. In those provisions, it was contended, is contained the complete code for illness of a seaman. It was further contended that s. 34, sub-s. 1, requires the owner to provide necessary surgical and medical advice "and also the expenses of the maintenance . . . . of the seaman until he . . . . is returned to a proper return port, and of his conveyance to the port," but that this is not to apply to illness caused by venereal disease, and that therefore the owners in the present case were not bound to provide medical advice or conveyance home for this seaman who was suffering from venereal disease. Also that "maintenance" in s. 41 does not include medical expenses. It was further argued that if the defendants were bound to convey the seaman home, at any rate they were not bound to pay hospital expenses, and that the wages should be applied to meet the cost of conveyance.

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In my view, ss. 34 and 41 overlap in subject-matter. Sect. 34 applies to all seamen whether in distress or with means. In either case the master must, subject to exceptions, pay their medical expenses. Sect. 41 applies to all seamen in distress, whether well or ill; in either case the owner must pay their return home and their necessary clothing and maintenance. But when I find that s. 34 distinguishes "necessary surgical and medical advice," &c., from "the expenses of the maintenance," and that s. 41 only speaks of "their necessary clothing and their maintenance," omitting any provision for surgical and medical expenses, I feel bound to hold that this distinction and omission were intentional, and that the Legislature did not mean to put on an owner the medical expenses of a seaman except in the cases provided for in s. 34, and did not intend to make him pay by s. 41 expenses due to venereal disease from which they had expressly relieved him by s. 34. So far, therefore, as the "hospital expenses" are fees for medical or surgical attendance and medicine I hold they are not recoverable from the owner. I cannot conceive that Parliament used the word "maintenance" to cover, say, the fee of a surgeon for amputating a leg. The distinction between "clothing" and "maintenance" in s. 41 suggests that the latter word is intended to cover board and lodging—its ordinary meaning.

I have felt more difficulty on the point whether the owner is liable for such maintenance as is due, not to the absence of a return ship or of suitable employment, but to illness for which the owner is not under s. 34 liable. It would seem reasonable to hold that he is not, but I am sitting as a judge, not a legislator, and I cannot find any words justifying me in restricting maintenance under s. 41 to maintenance of a person otherwise able to travel or work. Although I do not think the point was argued before me, I notice that s. 41 requires the Consul to provide maintenance in accordance with the "distressed seamen regulations." These are made by the Board of Trade under the authority conferred by s. 40 with respect to the "relief, maintenance, and return" of seamen, and the seaman is not to have any right to be relieved, maintained, or returned except as provided in the regulations. The primary object seems to be

rather to cut down the seaman's right than to increase the owner's liability. The term "relief" is not used in the other sections, and there is no provision that the owner shall pay the expenses of "relief." Regulation VIII. says "Medical advice and medicine may be provided when necessary," and regulation XXIII. requires medical expenses caused by venereal disease to be defrayed as far as possible out of the seaman's wages. I do not think these regulations place upon the owner any further liability than is contained in ss. 34 and 35 of the Act; if they do they appear to me to be ultra vires. I have only to add that Mr. Bailhache based an argument as to the incomplete character of s. 41 as a code on s. 32 of the Act, and the position of a seaman discharged by his own consent, who, he argued, was not within the distressed seamen sections. It is not necessary for me to express an opinion on this point, which appears to require careful consideration of the relevant sections.

The Board of Trade on behalf of the Crown appears to be entitled to a declaration that it can recover from the owners the expenses of maintenance in the sense of board and lodging and conveyance home of a distressed seaman though suffering from venereal disease or other illness due to his own wilful act, default, or misbehaviour, but it cannot recover any medical or surgical expenses of such seaman.

*Judgment accordingly.*

Solicitor for plaintiffs: *R. Ellis Cunliffe.*
Solicitors for defendants: *Botterell & Roche.*

J. E. A.

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*March* 19, 23, 24, 31.

[IN THE COURT OF APPEAL.]

# ROSE *v.* SPICER.
# ROSE *v.* HYMAN.

*Landlord and Tenant—Long Lease—Repairing Covenant—Breach—Waste—Relief against Forfeiture—Terms of Relief—Conversion of Chapel into Theatre—Structural Alterations—Reinstatement—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 2, 3.

A piece of ground and the chapel then being erected thereon were demised for a term of ninety-nine years less ten days from Christmas, 1842, and the lease contained covenants by the lessees to complete the chapel by a given date and from time to time during the term to repair, maintain, and keep the chapel and the walls, fences, and other appurtenances thereto belonging in good and substantial repair. The chapel was used as a place of religious worship under the terms of a trust deed for sixty years. The lease was then sold with the consent of the Charity Commissioners, and the premises were adapted for a theatre. For this purpose the purchasers removed some iron railings which separated the premises from the adjoining street, opened a new door in the west wall of the building, and removed two staircases and constructed two new staircases at the opposite end of the building. The vendor had neglected to comply with a notice to repair, and the reversioner was entitled to possession subject to the question of relief against forfeiture:—

*Held* (Buckley L.J. dissenting), that the alterations were breaches of the covenant to repair and were acts of waste which the Court would restrain by injunction, and that the relief ought not to be granted except on the terms of the reinstatement of the premises in their former condition.

The principles on which relief against forfeiture will be granted considered.

In this case Hyman and Rosenthal, the defendants in the second action, appealed against two orders of Ridley J. and also against an order of Horridge J., the result of a complicated series of interlocutory applications; but upon the hearing of the appeals it was agreed that the only substantial question at issue between the parties was as to the terms upon which Hyman and Rosenthal, the assignees of a lease dated May 28, 1845, should be relieved from forfeiture, and that that question should be determined on its merits.

By an indenture of lease dated May 28, 1845, made between Mary Ann Marshall, widow, of the one part, and several persons,

thereinafter called "the said lessees," of the other part, after reciting that by an agreement dated December 24, 1844, John Ditchman agreed to demise to the said lessees the piece of ground by the now stating indenture more particularly described and intended to be thereby demised from December 25, 1842, for the term of ninety-nine years wanting ten days at the yearly rent of 33*l.*, and that the said lessees thereby agreed on or before June 24, 1846, to expend 2,000*l.* at the least in erecting upon the said piece of ground "a chapel or place of religious worship with its appropriate offices with all party and other walls and that such chapel offices and party walls should be built in every respect in conformity with the plans and specifications therein particularly mentioned and signed by the said parties and with proper footpaths in the front and at the sides thereof next the street," and that the said John Ditchman further agreed that when the said chapel should be built up and covered in he would grant a good and sufficient lease of the said piece of ground and buildings thereon erected "with the yards and other conveniences and appurtenances attached or belonging thereto" to the said lessees or their nominees for the term aforesaid, such lease to contain the covenants therein mentioned, being the covenants contained in the now stating lease, and reciting that by an indenture dated March 19, 1845, the said John Ditchman assigned to the said Mary Ann Marshall the said piece of ground with the chapel erecting and building thereon for the residue of the term under which he held the same, subject nevertheless to the above recited agreement, a certain piece of ground situate at the corner of Hackney Road and St. Peter's Street, Bethnal Green, "together with the chapel or place of public religious worship with its offices and premises now erecting and building thereon by the said lessees," and all rights, easements, and appurtenances thereto belonging were demised at the rent and for the term mentioned in the above recited agreement. The lease contained a covenant by the lessees that they would on or before June 24, 1846, complete and make ready for public worship the "said chapel or place of public religious worship with its appropriate offices and all appurtenances thereto belonging"; and it also contained the following covenants:

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"And also shall and will from time to time and as often as occasion shall require during the said term well and substantially repair support uphold maintain pave . . . . amend and keep the said demised chapel offices buildings and premises and all the walls fences pavements . . . . and all other appurtenances thereto belonging in good substantial and tenantable repair . . . . And also shall not nor will at any time during the said term alter or vary the front elevation of the said demised chapel offices buildings and premises" without the consent in writing of the lessor. Then followed a covenant to yield up to the lessor at the end of the term the premises with the appurtenances so repaired, supported, upheld, maintained, paved, amended, and kept as aforesaid, with all landlord's fixtures and all improvements. And the lease also contained covenants not to carry on or permit or suffer to be carried on in or upon the said ground, chapel, offices, buildings, or any part of the demised premises certain trades (being in the main trades of an offensive nature) therein specified, not to permit the premises to be converted into a national school or public Sunday school, charity school or parochial school, and not to permit or suffer to be carried on thereon any noxious, noisome, or offensive trade, business, or occupation whatsoever, or that might be or grow to be a nuisance to the occupiers of adjoining premises, without the previous consent in writing of the lessor and of the superior landlord; and the lease contained a power of re-entry for arrears of rent and for breach of covenant.

The chapel was completed, and under the terms of a trust deed was used as a place of religious worship until about the end of 1909. At that time James Spicer was the sole surviving trustee of the premises, and the lease of May 28, 1845, was vested in him.

The chapel had since been unused and had fallen into disrepair.

In April, 1910, Spicer agreed, subject to the consent of the Charity Commissioners, to sell the premises for the residue of the term to Edith Falander and Edward M. Montefiore, and they in turn agreed, subject to the like consent, to sell the premises to H. T. Underwood. In May, 1910, Underwood sold the benefit of

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the last-mentioned agreement to Hyman and Rosenthal, who proposed to use the premises as a cinematograph theatre.

On July 22, 1910, Mrs. Mary Rose, in whom the reversion expectant on the lease of May 28, 1845, had become vested, served a notice to repair on Spicer, and on November 12, 1910, on his failure to comply with this notice, she commenced an action against him for possession. She, however, through her solicitors offered to allow him further time to complete the repairs required by the notice. In the meantime an order dated August 11, 1910, was made by the Charity Commissioners on the application of Spicer vesting the demised premises in the London Congregational Union for the residue of the term, and by a further order of the Charity Commissioners the union, as trustees of the charity, were authorized to sell the premises. Accordingly by an indenture dated November 30, 1910, the London Congregational Union, as trustees and at the request of Spicer, assigned the premises for the residue of the term to E. M. Montefiore and Edith Falander, and by an indenture dated December 1, 1910, the assignees, at the request of Underwood, and Underwood assigned the premises to Hyman and Rosenthal as tenants in common.

Hyman and Rosenthal immediately entered into possession and proceeded to put the premises in thorough repair and to make the structural alterations necessary to adapt the premises for use as a cinematograph theatre and to comply with the requirements of the London County Council. They removed some ornamental iron railings, and a low stone kerb on which they rested, which surrounded the property on the north and west sides and enclosed a space about 12 feet wide between the chapel and the public footway; they opened a new door 7 feet high by 4 feet 6 inches wide in the west wall; they constructed two new fireproof staircases at the south end of the building in lieu of the two wooden staircases at the north end which they removed, and in order to give access to these staircases they removed a portion of the gallery at each side of the building; they removed the organ and blocked up the organ chamber with a plaster screen; they erected a lantern room at the north end of the building and took out one panel of the ceiling and reconstructed it on a slope;

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they formed a vestibule inside the main entrance and constructed new lavatories and a manager's office, and to one of the lavatories they provided a small window in the west wall of the building; also they slightly raised the general level of the floor, which was formerly not of one uniform level.

On January 24, 1911, while these works were in the course of construction, Mrs. Rose commenced an action against Hyman and Rosenthal for (1.) damages for injury to her reversion, (2.) an injunction, (3.) possession, and on February 4 she obtained from Horridge J. an interlocutory injunction restraining the defendants from altering the character of the chapel or its offices.

On February 10 Hyman and Rosenthal obtained ex parte an order from the Master giving them leave to appear in the action of *Rose* v. *Spicer* and defend the same.

On the same day (February 10) they applied in both actions that they and Spicer might be relieved from forfeiture of the lease and for consolidation of the two actions.

On February 14 the plaintiff applied that the ex parte order giving Hyman and Rosenthal leave to defend the action of *Rose* v. *Spicer* might be discharged.

On February 15 both matters came before the Master, who made no order upon the application for relief except that it was without prejudice to any application for relief to the judge at the trial and that the two actions should be tried together by the same judge. Both parties appealed against this order to the judge in chambers, Ridley J. The learned judge by two orders dated March 2 allowed the plaintiff's appeal and struck out the appearance of Hyman and Rosenthal in the action of *Rose* v. *Spicer* and dismissed the defendants' appeal from the refusal of the Master to order relief.

The defendants Hyman and Rosenthal appealed from the order of Horridge J. and from the two orders of Ridley J.

Upon the hearing of the appeals the appellants offered as the terms on which relief should be granted to deposit a sum sufficient to ensure the restoration of the premises to their former condition at the end of the term, to pave to the satisfaction of the lessor's architect the ground enclosed by the former fence in such a way as to distinguish it from the public footway, and to

supply and from time to time erect in the line of the old fence to the like satisfaction a movable fence consisting of uprights resting in sockets in the ground and connected by chains or bars.

*Buckmaster, K.C.*, and *Disturnal*, for the appellants. The question is on what terms relief should be granted to the appellants under s. 14 of the Conveyancing Act, 1881. The purposes for which these premises are to be used are not within the purposes prohibited by the lease, nor is there anything in the lease requiring the lessees to keep the premises in the actual condition in which they were when they were demised for the purposes of a chapel. The covenants as to the user of the premises prohibiting the carrying on thereon of certain specified trades and of offensive trades generally imply that the premises may be used for other trades or businesses not expressly forbidden thereby, and the covenant prohibiting the alteration of the front elevation involves that reasonable alterations may be made in other parts of the building. The alteration to which the most serious objection is taken is the removal of the ornamental railings, but the lease contains no covenant to fence, though it contains a covenant to repair fences in collocation with a number of general words, and there is nothing in the lease to shew when these railings were put up or that they were included in the plans of the building. Having regard to the offer of the appellants, there is no danger that the courtyard will be thrown open to the public or that the reversion will be in any way injured by the removal of these railings, and their removal is necessary to comply with the requirements of the London County Council for ensuring the safety of the public. This building was a disused chapel, and the value of the reversion will be greatly enhanced by the adaptation of the building for a cinematograph theatre; nor is there anything in the alterations which will prevent the use of the building as a chapel at the end of the term. The foundation of the reversioner's action is not the material objection that the alterations will damage the property, but the sentimental objection that the appellants are intending to use the building for a purpose of which she does not

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approve. If the alterations are a breach of the covenants in the lease they must be made good, but if not they will not be restrained by the Court unless they cause material as distinguished from sentimental damage. *Doherty* v. *Allman* (1) shews that the Court will not interfere to restrain waste where it is either ameliorating waste or trivial waste, and it applies to this case.

[COZENS-HARDY M.R. referred to *Dendy* v. *Evans*. (2)]

The offer of the appellants is sufficient to meet any substantial objection of the reversioner to the alterations which are in progress, and no further terms ought to be imposed on them.

*P. O. Lawrence*, *K.C.*, and *G. H. Higgins*, for the respondent. The fence and wall which the appellants have pulled down were an integral part of the scheme of the building, and, although the plans have been lost, the proper inference is that they were included therein. The removal of this fence and wall constitutes a breach of the covenant to repair, uphold, and maintain the walls and fences: *Doe* v. *Bird*. (3) The opening of the new door in the west wall is also a breach of the covenant: *Gange* v. *Lockwood*. (4) Relief against forfeiture will not be granted on the terms of allowing a continuing breach of the covenant, but will only be granted upon the terms of the tenant restoring the property to the condition in which it was before the forfeiture: *Batson* v. *School Board for London*. (5) The covenant not to alter the front elevation is something additional to the general covenant as to maintaining fences and walls, and does not detract therefrom. Then as to waste, this is not ameliorating waste. *Doherty* v. *Allman* (1) is distinguishable, because in that case the lease was for 999 years and there was no power of re-entry for breach of covenant and the alterations were obviously beneficial to the reversion. This building was designed for religious worship and was intended to be maintained as a chapel; and it would be waste to convert it by internal structural alterations to any other purpose: *West Ham Charity Board* v. *East London Waterworks Co.* (6) The covenants as to offensive trades were unnecessary and must

(1) (1878) 3 App. Cas. 709, 724.
(2) [1910] 1 K. B. 263.
(3) (1833) 6 Car. & P. 195.
(4) (1860) 2 F. & F. 115.
(5) (1904) 69 J. P. 9.
(6) [1900] 1 Ch. 624.

have been inserted in the lease per incuriam; they were no doubt copied from the superior lease. But on no view of those covenants can the tenant derive any implied authority from them to alter the whole interior structure of the building.

*Buckmaster, K.C.*, in reply. In *Batson* v. *School Board for London* (1) the covenant was to keep the buildings in the state in which they then were, as appears from the report of the case at an earlier stage. (2) It has therefore no application. Covenants to repair and maintain, &c., must be construed reasonably with reference to the possible use to which the demised premises may be put: *Bickmore* v. *Dimmer*. (3)

[COZENS-HARDY M.R. referred to *Joyner* v. *Weeks*. (4)]

*Cur. adv. vult.*

March 31. COZENS-HARDY M.R. When Parliament in 1881 empowered the Courts to relieve against forfeiture for breach of the covenants in a lease a wide discretion was given to the Court either to grant or refuse relief, having regard to the conduct of the parties and to all other circumstances, and in case of relief such terms, including the granting of an injunction to restrain a like breach in the future, may be imposed as the Court in the circumstances thinks fit. I am aware of the danger of defining the mode in which discretionary powers of this nature ought to be exercised. Yet I think it expedient to attempt to lay down some general principles. In the first place the applicant must, so far as possible, remedy the breaches alleged in the notice and pay reasonable compensation for the breaches which cannot be remedied. In the second place, if the breach is of a negative covenant, such as not to carry on a particular business on the demised premises, the applicant must undertake to observe the covenant in future, or at least must not avow his intention to repeat the breach complained of. In the third place, if the act complained of, though not a breach of a negative covenant, is of such a nature that the Court would have restrained it during

(1) 69 J. P. 9.
(2) (1903) 67 J. P. 457.
(3) [1903] 1 Ch. 158.
(4) [1891] 2 Q. B. 31.

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the currency of the lease on the ground of waste, the applicant must undertake to make good the waste if it be possible to do so. In the fourth place, if the act complained of does not fall under either the second or the third head, but is one in respect of which damages, other than nominal, might be recovered in an action on the covenant, the applicant must undertake not to repeat the wrongful act or to be guilty of a continuing breach.

In short, subject only to the maxim de minimis, the applicant must come into Court with clean hands, and ought not to be relieved if he avows an intention to continue or to repeat a breach of covenant.

It remains to apply these principles to the present case. In 1844 an agreement was made under which a chapel was to be erected in conformity with plans and specifications signed by lessor and lessees. In pursuance of the terms of the agreement a lease was granted on May 28, 1845, for a term of ninety-nine years less ten days from Christmas, 1842, at an annual rent of 33*l*. The property demised was a corner piece of land bounded by the Hackney Road on the north and by St. Peter's Street on the west, together with the chapel or place of public religious worship with its offices and premises then erecting and building thereon. The lease contained a covenant to complete the chapel with its appropriate offices and all appurtenances thereunto belonging before Midsummer, 1846. I infer that the chapel, as erected, including the dwarf boundary wall and iron railings, was in conformity with the plans stipulated for by the lessor in 1844. There is nothing in the lease itself to create a charitable trust. That was created by a subsequent declaration of trust. For more than sixty years the chapel, as originally built, was used as a chapel. But under an order of the Charity Commissioners the leasehold interest has been sold. The lease was assigned by deed dated December 1, 1910, to the defendants, who are proposing to alter the building so as to adapt it for a theatre. Meanwhile the property had fallen out of repair. A notice to repair was served in July, 1910, upon the then owner of the lease, and such notice not having been complied with the plaintiffs on November 11, 1910, issued a writ to recover possession. On January 24, 1911, a writ was issued against the

present defendants, and there is a summons dated February 10, 1911, seeking relief from the forfeiture.

Now it is not disputed that the plaintiff's title to possession is good unless relief is granted. The defendants have remedied, or will forthwith remedy, the breaches alleged in the notice to repair, so far as the changes made in this building admit. There is no negative covenant material to be considered, unless it be a covenant not to alter or vary the front elevation. The difficulty arises on the third and fourth points, which I have indicated. The defendants have (1.) opened a door in the main wall into St. Peter's Street; (2.) removed the railings and dwarf wall on the north and west sides, thus throwing strips of ground into the streets; (3.) removed the gallery staircases near the north entrance and substituted new staircases at the southern end; and there are other less important alterations in the interior. In my opinion these are acts of waste of such a nature that the Court would have restrained the lessees from committing them. They have entirely altered the character of the demised building. If I am right in this view the fourth point need not be considered. But I think the acts I have referred to, and particularly the opening the door and the removal of the dwarf wall, are breaches of the covenant to repair and keep in repair: *Gange* v. *Lockwood*. (1) [The Master of the Rolls read the covenant.] It would be a continuing breach if the lessees do not fill up the doorway and make good the wall. This is not a case in which nominal damages alone could be recovered, and the actual pecuniary loss to the plaintiffs is not necessarily the measure of damages. The applicants are in mercy. They avow their intention to keep the door open, and they claim the right to make and maintain the alterations they have effected, without which the building cannot be used as a theatre. In my opinion they assert the right to commit a continuing breach of a character which is by no means trivial in its nature. They do not come into Court with clean hands, and they are not entitled to relief except upon terms to which they are not willing to submit. I think the appeal should be dismissed with costs.

(1) 2 F. & F. 115.

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FLETCHER MOULTON L.J. The appeals that are before us in this case are the outcome of a tangle of interlocutory proceedings relating to applications for relief from forfeiture for breach of a covenant to repair under a certain lease dated May 28, 1845, of which some thirty years are yet unexpired. It would be quite unprofitable to enter into the detail of these interlocutory proceedings. The parties were at times not fully aware of the true history of the lease, and decisions at chambers were given on inaccurate or incorrect information. But the counsel representing the two parties before us have taken the sensible course of waiving all technical questions as to these proceedings and agreeing that the appeal should be treated as though it were an application for relief from forfeiture properly brought before us from a refusal of the learned judge at chambers. The facts as to the acts of the parties both before and subsequent to the forfeiture are agreed. The specific fact upon which the forfeiture took place was the neglect to repair after a notice to repair had been served on the lessees on July 22, 1910. It is admitted that certain of those repairs have not been done and that the appellants do not propose to do them. They ask that relief from the forfeiture should be given without their being required to do them. We are asked to decide what under all the circumstances of the case should be the terms upon which relief against the admitted forfeiture should be allowed.

The history of the premises so far as is material is as follows. The premises are a plot of ground in the Hackney Road on which stands a chapel. From the recitals in the lease it appears that in the year 1844 one John Ditchman agreed to demise to certain persons who are named in the lease as lessees the plot of ground in question for a term of ninety-nine years wanting ten days from December 25, 1842, at a rent of 33*l.* a year, the lessees undertaking to build thereon a chapel or place of public religious worship with all party and other walls in conformity with the plans and specifications therein specifically mentioned and signed by the parties, and with proper footpaths in the front and in the sides thereof next the street, and that the said John Ditchman further agreed that so soon as the said chapel and building should be built up and covered in he or his representatives would

grant a lease to the lessees or their nominees, and that such lease should contain covenants, clauses, provisoes, and agreements such as appear in the lease. It then recites that the said John Ditchman assigned to the lessor, Mary Ann Marshall, the plot of ground with the buildings on it, subject to the said recited agreement, and that the lessees had called upon the lessor to execute such lease to them. It is not necessary to deal in detail with the rest of the lease, which is expressed to be of the said ground, chapel, offices, and premises. There is covenant, however, that the lessees will completely finish and make ready for public worship the said chapel or place of religious worship with its appropriate offices and all appurtenances thereunto belonging, and that they will pay the rents and taxes. Then follows the clause as to repair, which is the material one and reads as follows. [The Lord Justice read it.] The other clauses of the lease are in my opinion immaterial for the immediate purpose of the decision in this case.

The premises appear to have been held under a trust deed for public worship according to particular religious tenets down to the year 1910 or thereabouts, when by an order of the Charity Commissioners they were directed to be sold. At the date that the present lessees acquired the lease by assignment they had not been used for the purposes of religious worship for some months and possibly for about a year. The present lessees acquired the lease with the intention of turning the premises into a cinematograph theatre. For that purpose they removed the railings which ran along the front and western side of the plot of ground and separated it from the street and the low curb or wall on which they stood, made openings in the western side wall for the purpose of a door to the street and a window to a lavatory which they constructed within. Internally they removed the two staircases which led up from the vestibule to the galleries of the chapel and constructed lavatories and an office in part of the space formerly occupied by them. The access to the galleries was arranged on each side at the opposite end, two staircases being erected leading down from the gallery to doors situated in the side walls, one of the said doors being the one constructed in the west wall as mentioned above. Portions of the

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gallery were removed as they would have interfered with these staircases. A lantern room was erected over the rear of the gallery, and the panel of the ceiling adjoining was sloped up to enable the pictures to be thrown upon the screen, which was at the end of the chapel formerly occupied by the pulpit. The material portions of these alterations are (1.) the removal of the external railings and the wall on which they stood, (2.) the opening in the side wall for the purpose of a side door, (3.) the removal of the staircases at the entrance end within the building, and (4.) the erection of the two new staircases at the opposite end of the building, and the removal of portions of the gallery necessitated by their erection. These are matters insisted upon by the London County Council before it will permit the building to be used as a cinematograph theatre, and accordingly if the appellants do not secure the power to make these alterations they will abandon their application for relief.

In my opinion it is not necessary to discuss exhaustively the terms on which the Court will grant relief from forfeiture. One thing appears to me to be axiomatic, namely, that the Court will not grant relief to a lessee who persists in a continuing breach and who informs the Court that it is his intention so to persist. Whatever other terms the Court feels justified in requiring as a condition for relief, the applicant must be willing to repair the breach so far as it has been committed and put himself in a position in which he can observe the covenants in the future If, therefore, what the applicants have done and propose to continue is a breach of the covenants of the lease the matter is at an end. The Court cannot vary the contract between the parties. It can only relieve from the penal consequences of a past breach. It cannot condone future breaches or free the contracting party from the obligations imposed upon him by his covenant. The ground on which jurisdiction to relieve from forfeiture has been asserted by the Courts or granted to them by statute is obviously that penal provisions such as a clause for re-entry should be in truth regarded as solely intended to secure the due observance of the terms of the bargain. The Court is therefore not changing the true bargain between the parties by granting relief from forfeiture if in so doing it takes care to secure the object

of the penal clause, i.e., the due performance of the covenants. But to use the powers as possessed by it to change the true contractual relations between the parties by sanctioning and protecting breaches of the covenants would be to depart from the principles which in the past had guided its action in granting relief and shut its eyes to that which is evidently the object of the statutory increase of its powers.

I ask myself, therefore, the question Are the proposed alterations or any of them breaches of the covenant to repair? Incontestably they are. The lessees covenant to repair, support, uphold, maintain, and keep the said demised chapel, offices, buildings, and premises and all walls, fences, and all other appurtenances thereto belonging in good, substantial tenantable repair and condition. The present assignees have destroyed, or propose to destroy, entirely, the only fences to the premises and the wall on which they stand, they have made openings of large size in the side wall of the building, they have removed entirely two staircases inside the building and made structural changes so as to occupy the place where they formerly stood, they have removed portions of the gallery, and they have built two other staircases which, while they stand as at present, prevent the gallery being restored to its former condition. Every one of the parts of the premises thus interfered with was annexed to and formed part of the freehold. Had the railings or the staircases or the gallery fallen out of repair a notice to repair them must have been obeyed by the lessees on pain of forfeiture. How can it be gravely suggested then that their actual removal and destruction is not a substantial breach of the covenant to repair and maintain?

On this plain ground, therefore, I am of opinion that relief cannot be granted to the lessees otherwise than on the terms of their reinstatement of the premises in their former condition. So long as they persist in keeping them as they are at present they are guilty of a continuing breach.

This case has, however, formed the subject of an argument conducted with great fervour and ability on behalf of the appellants, lasting more than a day, and out of respect to that argument I will examine the various points raised therein. I

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have some difficulty, however, in coming to a clear conclusion as to whether the appellants' counsel accepted the principle that the applicants for relief must be prepared to perform their covenants. At one time he certainly admitted this, but the admission was inconsistent with the substance of his argument. However, as I hold so clear an opinion upon it, I shall not deal with it further, but proceed to examine the arguments urged to shew that the proposed alterations do not constitute breaches of the covenant.

In the first place it was suggested that it was not proved that the railings and the wall on which they stand were erected at the date of the execution of the lease. I entirely fail to appreciate the relevance of the remark. Whenever erected they became on erection part of the freehold to which they were annexed, and it is elementary law that a general covenant to repair and maintain such as we have here would apply to them. If a lessee whose lease contains such a covenant erects a house on the land leased to him he is just as much bound to maintain it and keep it in repair as if it had been built before the lease was granted.

Attention was next called to a covenant not to alter or vary the front elevation of the said demised chapel without the consent in writing of the lessor. Once more I fail to see what bearing this can have on the subject. It would be quite possible to alter the front elevation without committing a breach of the covenant to repair, and therefore there is scope enough for the operation of a special covenant of this kind without any interference with the clear and unmistakable meaning of the language of the covenant to repair. Moreover, the presence of this special covenant as to the front elevation cannot weaken the protection which the general covenant to maintain affords to the rest of the building.

It was next pointed out that, although the premises were referred to throughout as a chapel, &c., there was no covenant to use them only as a place of worship. This is true, and the lessor cannot insist on their being so used. But that does not disentitle her to have her covenant as to the maintenance of the structure duly observed, and it may well be that if this is done

the use for a chapel will be practically ensured. But in dealing with this point counsel for the appellants appealed to the covenant that is to be found respecting user. It is the ordinary covenant against carrying on any noxious, noisome, or offensive trade, business or occupation, with a specific prohibition of certain businesses such as tripe boiler, soap maker, tanner, or wadding maker, &c. The appearance of this covenant in the lease is presumably due to the fact that the lease is an underlease and that this is the covenant as to user which is found in the head lease. Counsel for the respondent informed us, I think, that this is the fact. But quite apart from this, the covenant that certain businesses may not be carried on upon the premises does not control or cut down the covenant to repair. It only means that even if you could do so without altering the premises you must not carry on these businesses upon them.

But the bulk of the argument was based on the contention that because the lessees were spending a large sum on the premises to adapt them to the purposes for which they designed to use them those premises would become pecuniarily of more value in the market thereby, and that this gave them some right to make the alterations, or some justification for having done so, to which the Court should have regard. The phrase "ameliorating waste" was freely used in this connection. In my opinion it is not necessary to consider the question of waste in any way, though I should probably come to the same conclusion if I dealt with the case from that point of view. This is a plain case of a breach of a covenant in a lease where there is a condition of re-entry upon such breach, and I cannot see that the appellants would be benefited by proving (as they allege but the respondent denies) that the premises would sell in the market for a larger price by reason of the alterations. The covenant is to repair and maintain the premises. It is not a covenant which is satisfied by altering the premises even though as altered they be of equal or greater value. What right then has the Court to change the bargain between the parties? It has no paternal jurisdiction to vary rights when it thinks that it would be for the pecuniary benefit of the parties. Not only has it no such jurisdiction, but it has neither the qualifications

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nor the knowledge to enable it to exercise any such jurisdiction to the advantage of the parties or the public. For example, how is it to decide in the present case whether the reversion will in fact be benefited by the alterations? There may be at the present moment a brisk demand for cinematograph theatres just as there was for skating rinks a year or two ago. But who is to say whether thirty years hence this demand will continue or whether, as is reported to have been the case with skating rinks, the ebb will be as rapid as the flow of the tide? But the objections to the Court interfering with a bargain made with due formalities go yet deeper. The lessor is entitled under the covenant to have the premises kept in their present condition. She desires that this should be done. Why should we pry into or criticize the motives which lead her to insist on her plain rights? It may be that she as a lessee is herself under like obligations to her lessor and that the breaches of covenant by the applicants will or may render her own lease liable to forfeiture. Or it may be that she desires the due observances of the covenants expressly because it makes it possible that premises suitable for public worship may be obtainable at a moderate rental, and that this would not be practical if those desiring so to use them were exposed to the competition of lucrative undertakings such as theatres. Such motives may well have influenced the terms on which the original lease was granted, but, whether this be so or not, I can see nothing unreasonable in her insisting for such or other reasons on the due performance of the covenant, and even if I did I should not think it any warrant for taking her rights away from her by the act of the Court.

Counsel for the appellants treated this part of the case as though he were trying to avert some injustice which would otherwise be done to his clients. I cannot follow this. When the lease was originally granted the parties no doubt thought that the chapel would be used throughout the time for the purposes of the trust. Times have changed and the Charity Commissioners have allowed the lease to be sold, and inasmuch as there is no covenant against assignment without consent the appellants were able to get possession of it. The respondent cannot complain that it is

in their hands. They are in the possession of the interest of the original lessees, but they are neither legally nor morally entitled to more. The price paid for the lease by the appellants must have been determined by the nature of the bargain the benefit of which they took by the purchase. Every one knows that the burden of the covenants affects the value of the term, and the price that they paid for it would depend on the value of the possession of the land when saddled with the obligation of keeping the covenants. What equity or claim can they have on the Court to give them more than that which they thus paid for?

It is needless to say that frequent reference was made by counsel for the appellants to the case of *Doherty* v. *Allman*. (1) That was a very different case. The unexpired portions of the two terms were both of them more than 800 years. There was no power of re-entry on breach of the covenant to repair. There was considerable doubt whether the act done was a breach of any existing covenant. But that which to my mind constitutes the broad distinction between that case and the present was that the application was there made by the reversioner, who asked a Court of Equity to assist him to enforce what he contended were his legal rights by granting him the remedy of an injunction. Every one of the Lords taking part in the decision based his opinion on the fact that the remedy by injunction is discretionary in the Court of Equity. The facts of that case were such that no Court would exercise its discretion for the purpose of enforcing anything so unreasonable as the applicant sought there to do, namely, to keep ruinous and unsuitable buildings untouched for a period of 800 years on the plea of protecting the rights of the persons who then might come into possession of them. Every one of these determining circumstances is absent in this case. It is in effect the lessees, and not the lessor, who are the applicants. The term has only thirty years to run. The buildings in the state in which they were when the applicants became possessed of the term were suitable for the purpose for which they were built, namely, religious worship. There is a power of re-entry which has been exercised, so that in law the

(1) 3 App. Cas. 709.

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reversioner has come into possession and will be able to enjoy the premises unless this Court intervenes to relieve the forfeiture and to put the lease in force again. There is nothing which can be called unreasonable in the lessor's preference for the premises in the condition in which they are suited for religious worship. The sole ground for the application is a contentious valuation of the market value of the premises if altered as proposed. Hence the case of *Doherty* v. *Allman* (1) gives no countenance to the contentions that have been put before us in this case on behalf of the appellants.

For these reasons I am of opinion that these appeals should be dismissed with costs, the appellants by their counsel having refused to accept relief on the terms of their performing the covenant to repair and maintain and abating the breaches which they have already committed.

BUCKLEY L.J. The question is as to the terms upon which the assignees of a lease of May 28, 1845, shall under s. 14, sub-s. 2, of the Conveyancing Act, 1881, be relieved against a forfeiture incurred for breach of a covenant to repair. I conceive that the terms which the Court will impose will be ascertained upon the following principle. Suppose there had been no breach of the covenant to repair, what acts has the lessee done in respect of which the lessor would have been entitled to relief either by way of injunction or of damages other than nominal damages? The terms should be that the lessee should undo all such acts as could have been restrained by injunction or for which the lessor could have recovered damages other than nominal damages and shall comply with the covenant to repair. Difficulty may arise in some cases in which the acts done cannot be undone, but I say no more about this, for it does not arise in the present case. Certain alterations have here been made in the demised premises, but they are all capable of being removed and the premises reinstated as in their former condition. If the alterations are such as the lessee could not properly have made as between himself and the lessor and are such as the lessor could have prevented by injunction or have obtained compensation for by damages, the proper

(1) 3 App. Cas. 709.

terms are, I think, that the lessee shall restore the premises as they were before the alterations. I exclude the case where the lessor could have recovered only nominal damages for this reason, that a recovery of nominal damages means that in fact no injury has been done. The Court will not, I think, make it a term that reinstatement should be made where no injury has been done by the alteration. If this be right in principle, it only remains to ascertain upon the proper construction of the lease whether any and which of the acts done are such as the lessor could have enjoined or in respect of which he could have recovered damages other than nominal damages. It appears by the recitals of the lease that on December 24, 1844, the building which was a chapel had not been erected or even, I think, commenced, and the ground was apparently open ground, for under the agreement of that date the lessees were to provide proper footpaths in the front and at the side next the street. When the lease came to be granted on May 28, 1845, it appears by the lease that the building was still unfinished, and there is nothing to shew that the dwarf wall and railing of which we have heard so much was then in existence or was shewn in any plan. From the recited agreement it appears that there existed at its date plans of the chapel offices and party walls, but there is nothing to shew that any plan disclosed this dwarf wall and railing. The demise was for ninety-nine years less ten days from Christmas, 1842, and the building was being erected for the purposes of a chapel or place of public religious worship. There are covenants not to alter or vary the front elevation or erect any other building on the ground without consent, and a covenant not to use the premises for certain defined businesses of an offensive kind and not to convert the premises into a school and not to permit any noxious, noisome, or offensive trade that may grow to be a nuisance. There is no covenant to fence, but there is a covenant to support, maintain, and uphold all the buildings and all walls, fences, pavements, &c. Upon the determination of the term the lessees are to yield up to the lessor the premises, together with all landlord's fixtures and all improvements. The word "improvements" is important: *Doherty* v. *Allman*. (1) Under

(1) 3 App. Cas. 709.

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this demise it was in my opinion competent to the lessees to discontinue the user of the building as a chapel or place of religious worship and (having regard to the covenant against certain trades) to use it for any other trade not forbidden by the covenant. Had the lessees used the premises for a draper's shop, a warehouse for storing goods, an office for the occupation of a life assurance company or gas company, or for numerous other purposes which might be suggested, they would have been within their rights and the lessor could have obtained no injunction to prevent them from so doing. The user of the premises for the purpose for which the lessees now intend to use them is, I think, a user legitimate under the terms of the demise. For the purposes of user for any trade not being a forbidden trade the lessees could, I think, reasonably arrange and equip the interior of the building as they thought proper. Had the building become a draper's shop they might have put in counters; had it been let to an insurance company they might have put in partitions and glass screens, and so on, by way of sub-division. Next as regards the structure itself. There is a covenant not to alter or vary the front elevation. It is legitimate, I think, to infer from this that the elevation of, say, the west wall might be altered. As regards any alteration of the structure the matter must be regarded from two aspects—first, upon the covenants of the lease, and, secondly, upon the doctrine of waste. It would be waste to make such alterations as to change the nature of the thing demised. The thing demised is premises which the lessee may consistently with the lease use for many purposes for which they are without alteration and adaptation not suitable. A right reasonably to alter and adapt is to be implied. It would be breach of covenant so to alter the structure as substantially to cease to perform the covenant to support, uphold, maintain, and so on, the buildings, walls, and fences in good repair. The whole question in the case, I think, is whether the acts done are such as to be in breach of either of these two obligations. The particular alteration on which most reliance is placed is the removal of the dwarf wall and iron railing which heretofore has surrounded the chapel on the north and west sides. The matter would be materially altered, I think, if it were found that this wall and

railing was specifically contemplated by the demise or was in existence at the time of the demise and was by the instrument pointed to specifically as a building to which the covenant to maintain extends. But there is nothing of the kind. The lessees are prepared to pave or lay the surface within the line of the previous railing in such a way as to mark it distinctively from the adjoining footpath and to supply a removable railing supported by iron stanchions resting in sockets in the pavement and to erect this fence from time to time so as to obviate any question as to the dimensions of the property or as to any dedication (if indeed they could make one) to the public. The question of this wall and railing is no doubt the most difficult part of the case, but I am not prepared to say that the maintenance of the particular railing which was put up at some time after 1845 is an act for which the lessees specifically covenant so that the lessor could either by way of injunction or damages have obtained relief if the lessees, not being in default, had removed it. The next most material alteration is the new door at the southern end of the west wall. Whether opening a door in a wall is a breach of a covenant to maintain the wall or is waste is to my mind largely matter of degree. Suppose that a wall contains no windows and that for the purpose of greater utility of the premises it is desirable to open a window in it, the wall is none the less, I think, maintained because it is maintained with a window opened through it at a particular point. The door in question seems to me to be of this kind. There is a covenant no doubt to maintain this western wall, but the covenant will not have been broken, I think, by opening this door for the more convenient user of the premises within. The alterations of the staircases and the seating and so on within the building offer, I think, much less difficulty. Because the floor has heretofore been at a certain level or the staircase has heretofore been in a particular place the covenant to maintain does not, I think, extend to prevent a reasonable alteration of the level of the floor or a beneficial construction of the staircase in an altered position. It remains that the Court no doubt will look jealously to see whether the acts done are such as to diminish the value of the reversion. I can find no evidence in this case that they will do

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so. On the contrary, in my opinion the value of the premises will be increased. It is only in this connection that I think it relevant to observe that the objections which the lessor is raising are evidently not inspired by any considerations of this kind, but upon other considerations to which no doubt all respect is due, namely, a desire that this building which has heretofore been used as a chapel shall not be used as a place of public entertainment. The terms which the lessor suggests as those upon which alone relief shall be granted are that all the alterations shall be cancelled and the building reinstated as it was before. In my opinion this should not be required. The lessees are willing and have offered, in addition to the terms which I should otherwise have thought right, to deposit a reasonable sum sufficient to ensure the entire restoration of the premises to their former condition as a chapel at the end or sooner determination of the term, and while accepting this offer as it is made it seems to me that the proper terms are that the lessees shall to the satisfaction of the architect of the lessor so pave the ground lying within the line of the former fence as to distinguish it from the adjacent footpath, and shall supply and from time to time erect a proper fence to the like satisfaction consisting of uprights resting in sockets in the ground connecting the one to the other by chains or bars so as to form a fence in the line of the former fence, and that the lessees shall repair the whole building consistently with the requirements of the notice to repair. Upon these terms I think that they are entitled to relief.

*Appeals dismissed.*

Solicitors for appellants: *John B. & F. Purchase.*
Solicitors for respondent: *Crossfield, Cushing & Wheldon.*

H. B. H.

## LONDON, GLOUCESTERSHIRE AND NORTH HANTS DAIRY COMPANY *v.* MORLEY & LANCELEY.

1911
*March* 17, 18, 21.

*London—Building—Party Wall—External Wall — Wall a Party Wall for Portion of its Height—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 5, 58.

By s. 5, sub-s. 16, of the London Building Act, 1894, the expression "party wall" includes a wall forming part of a building and used or constructed to be used for separation of adjoining buildings as therein described.

By s. 58, where a wall is built as a party wall in any part or becomes a party wall in any part the wall shall be deemed a party wall for such part of its length as is so used:—

*Held*, that a wall may be a party wall for such part of its height as is so used, and cease to be a party wall for the rest of its height.

APPEAL of Messrs. Morley & Lanceley from the judgment of the Lambeth County Court on an appeal to that Court under s. 91, sub-s. 2, of the London Building Act, 1894.

The London, Gloucestershire and North Hants Dairy Company, the respondents, were lessees of land bounded on the east by a wall on which their business premises abutted. The question in the case was whether this wall was a party wall within the meaning of ss. 5 and 58 of the Act. (1) On the other

(1) The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 5: "In this Act unless the context otherwise requires—

. . . . . .

'(15.) The expression 'external wall' means an outer wall or vertical enclosure of any building not being a party wall.

"(16.) The expression 'party wall' means—

"(*a*) A wall forming part of a building and used or constructed to be used for separation of adjoining buildings belonging to different owners or occupied or constructed or adapted to be occupied by different persons; or

"(*b*) A wall forming part of a building and standing to a greater extent than the projection of the footings on lands of different owners."

Sect. 58: "In either of the following cases:—

"(*a*) When a wall is after the commencement of this Act built as a party wall in any part; or

"(*b*) Where a wall built before or after the commencement of this Act becomes after the commencement of this Act a party wall in any part;

the wall shall be deemed a party wall for such part of its length as is so used."

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side of this wall was a passage separating it from the backs of certain shops formerly leased to but now the freehold of Messrs. Morley & Lanceley. In the year 1890 Messrs. Morley & Lanceley covered the passage with a glazed roof and extended their shops backwards till they reached the wall. In 1898 they raised the wall and constructed above the passage and abutting on the wall a gangway communicating with their shops. Subsequently the dairy company raised the wall, inserting air bricks therein for the purpose of ventilating their premises.

Messrs. Morley & Lanceley, being desirous of further raising the wall, gave a party structure notice to the dairy company under s. 90, sub-s. 1, of the Act. They alleged that the wall was a party wall within the meaning of s. 5, sub-s. 16, that they were building owners within sub-s. 31, and that the dairy company were adjoining owners within sub-s. 32 of that section. Surveyors were appointed under s. 91, sub-s. 1, to settle matters in dispute, with power by their award to determine the right to do and the time and manner of doing the proposed work. By s. 91, sub-s. 2, any award given by the surveyors appointed is subject to appeal to the county court, and the county court may rescind the award or modify it as it thinks just. The surveyors appointed made an award to the effect that the wall was a party wall, and that Messrs. Morley & Lanceley had a right to do the proposed work. From this award the dairy company appealed to the county court. Much evidence was adduced in that Court on either side as to the history and nature of the wall, as the result of which the county court judge found that it had originally been an external wall of the dairy company's premises. He held that it had by user become a party wall up to the height of Messrs. Morley & Lanceley's structure, but that above that height it was an external wall and not a party wall, and that Messrs. Morley & Lanceley had no right to do the proposed work; and he modified the award of the surveyors accordingly.

Messrs. Morley & Lanceley appealed.

*Leslie Scott, K.C.*, and *Heber Hart*, for the appellants. Under the London Building Act, 1894, a party wall must be a party

wall for the whole of its height. There is no such thing as a wall which is a party wall for part of its height and not a party wall as to the rest of its height. The whole scope of the Act is to exclude the idea of such a wall. A wall is regarded as a unit complete in itself; by s. 7 of Sched. I. to the Act it is to be measured from the base of the wall to the top of the topmost storey; by s. 8 of the same schedule walls are to be deemed to be divided into distinct lengths by return walls, and the length of every wall is measured from the centre of one return wall to the centre of another. Sect. 101 of the Act speaks of easements of light in a party wall which can only exist in that part of the wall which is higher than the building of the owner of the servient tenement. By sub-s. 16 of s. 5, the definition section, a party wall means a wall forming part of a building and used—that is to say, used for any part of its length or height—for separation of adjoining buildings. Prima facie, therefore, "wall" and "party wall" mean the structure to its full height and length. Then s. 58 enacts that where a wall becomes a party wall in any part it shall be deemed a party wall for such part of its length as is so used; that is to say, for such part only of its length as is so used. As to its height, it remains a party wall to its full height. When it is intended to put a limitation upon the height of a wall the Legislature expresses that intention, as in s. 5, sub-s. 17, where "cross wall" is defined. The result is that a wall which is a party wall for part of its height is a party wall for the whole of its height. The appellants are therefore entitled to proceed with the proposed work.

*Hudson*, K.C., and *R. J. Willis*, for the respondents. It was not intended in the London Building Act, 1894, to alter the law as it stood before the passing of that Act. Before the Act it was well settled that a wall separating two buildings was a party wall only to the extent, vertical or horizontal, to which it separated the buildings: *Weston* v. *Arnold* (1); *Knight* v. *Pursell.* (2) The dicta of Wright and Collins JJ. in *Drury* v. *Army and Navy Auxiliary Co-operative Supply* (3), in a case since the Act, are to the same effect. That being the law, s. 58 enacts that where a

(1) (1873) L. R. 8 Ch. 1084. (2) (1879) 11 Ch. D. 412.
(3) [1896] 2 Q. B. 271.

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wall becomes a party wall in any part it shall be deemed a party wall for such part of its length as is used as a party wall, i.e., for separation of the adjoining buildings. With regard to its height, to the extent to which it is used for separation of adjoining buildings it is a party wall; in so far as it exceeds the height of the lower building it may or may not be a party wall according as it is constructed to be used for separation of adjoining buildings. This wall was not so constructed. Sect. 58 does nothing to extend the height of a party wall beyond the height of the lower of the buildings which it separates. Sect. 101 of the Act was passed to declare the law laid down in *Crofts* v. *Haldane* (1) that a building owner is not entitled to obstruct an ancient light by raising a party wall. Sects. 7 and 8 of Sched. I. to the Act merely contain provisions for the thickness of walls, and are not ad rem in this matter.

*Leslie Scott, K.C.*, in reply. Part VIII. of the Act, consisting of ss. 87 to 101, constitutes a complete code of the law as between building owner and adjoining owner: *In re Stone and Hastie* (2); and this code is to be construed, not according to the law as it stood before the Act, but by giving their natural meaning to the words used: *Bank of England* v. *Vagliano Brothers*. (3) The natural meaning is that a wall which as to part of its extent is a party wall is a party wall for so much of its length as is so used, and for the whole of its height.

PHILLIMORE J. This appeal raises an interesting question under the London Building Act, 1894. Messrs. Morley & Lanceley, who are now the freeholders and were formerly the leaseholders of the property which they occupy, were minded to enforce the provisions as to party walls with regard to a structure which divided their property from that of the London, Gloucestershire and North Hants Dairy Company. They got an award from the surveyors, and from this award the dairy company appealed to the county court. The county court judge came to the conclusion that the structure in question was originally an external fence wall, the whole of which had been leased to the

(1) (1867) L. R. 2 Q. B. 194. (2) [1903] 2 K. B. 463, at p. 469.
(3) [1891] A. C. 107, at p. 144.

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predecessors in title of the dairy company. That is of course a finding of fact, but, inasmuch as Messrs. Morley & Lanceley, the appellants on the present appeal, have contended that there was no evidence to support that finding, we have had to go into the evidence. In my opinion not only was there evidence to support the finding, but the county court judge came to the right conclusion. [The learned judge reviewed at length the evidence on this point, and proceeded:—]

On the east side of this wall is a passage separating the wall from the back of the appellants' premises. The appellants built a roof over this passage, supporting it by means of iron stanchions which they erected against the wall. Afterwards they raised the wall in certain places by several courses of bricks, and built a gangway abutting on the wall and communicating with their shops. The dairy company, the respondents, subsequently raised the wall; and now the appellants seek under their party wall notice to raise it still higher.

The respondents insist that the wall is not a party wall, but their own external wall. They admit that it has become by user a party wall up to the height to which the appellants have built against it, subject to the question whether the gangway is a building. But above that height they say that it is not a party wall, and that the appellants have no right to build upon it.

The county court judge has found that the wall became by user a party wall up to a certain height; that above that height it was not a party wall. Accordingly he held that the award of the surveyors must be modified to the extent of saying that the upper portion of the wall was not a party wall. From that judgment the present appeal has been brought.

Counsel for the appellants contend that the effect of s. 58 (*b*) is to preclude the possibility of such a legal entity as a wall which is a party wall below but not above. They agree that there may be such a legal entity as a wall which is a party wall for part but not a party wall for the remainder of its length, but they say that the whole scope of the Act excludes the idea of a wall which is a party wall for part but not a party wall for the remainder of its height. I may say at once that, as to the whole scope of the Act excluding such a wall, I find no substance in

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that contention. There is, however, a difficulty in the way of the respondents in the wording of s. 58. That section provides that in either of the following cases—(*a*) when a wall is after the Act built as a party wall in any part; or (*b*) where a wall built before or after the Act becomes after the Act a party wall in any part—the wall shall be deemed a party wall "for such part of its length as is so used." The appellants contend that by making the wall a party wall for such part of its length, and placing no limitation upon its height, the Act has made the wall a party wall to its full height for such part of its length as is so used. The respondents contend that by the definition in s. 5, sub-s. 16, of the Act a party wall is a wall forming part of a building and used for the separation of adjoining buildings, and that there is nothing in s. 58 to extend the height of a party wall beyond the height of the lower of the adjoining buildings. Both sides have at different times appealed to s. 58 as a limiting section and have claimed to read it as if it ran "a wall shall be deemed a party wall for such part and such part only of its length as is so used." If that is the true construction there is no difficulty in the section; it is a limiting section enacted to prevent an undue extension of the effect of s. 5, sub-s. 16. If that is not the meaning of s. 58 (*b*) it is hard to find any meaning other than that suggested by the appellants, namely, that it excludes the possibility of a wall which is a party wall below but not above. I think that the best explanation of s. 58 (*b*) is that its object is to make it quite clear that s. 5, sub-s. 16 (*a*), means all that it says and no more. What it says is this: "A wall forming part of a building and used or constructed to be used for separation of adjoining buildings belonging to different owners or occupied or constructed or adapted to be occupied by different owners" is a party wall. Suppose that a wall forms part of a building and is as to part only of its bricks and mortar used for the separation of that from an adjoining building; is the whole of that wall a party wall, although only part is used for separation? Or is no part of it a party wall because some part is not used for separation? Obviously what is meant is that the wall shall be a party wall so far as it separates, none the less because it does not separate in other parts and none the more

because it is larger than is required for separation. Then s. 58 emphasizes this and no more as the meaning of the Act. In my opinion the county court judge was right and this appeal must be dismissed.

BANKES J. I agree. On the first point we have no right to interfere in this case if the learned judge had any evidence before him on which he could properly find that this wall was an external wall. We have had the evidence discussed at length before us. Without saying that I should have come to the conclusion at which the county court judge arrived, I think that there was evidence before him on which he could properly arrive at that conclusion.

The other point raises a question as to the proper construction of the London Building Act, 1894. I confess I have felt and still feel considerable doubt as to what the proper construction of that enactment should be. Counsel for the appellants invite us to regard it as a codifying Act, and, so treating it, to give the language its natural meaning. I assent to that. The difficulty is to discover what is the natural meaning of the language. The question arises on s. 5, sub-ss. 16 and 17, and s. 58. The appellants contend that it is not possible to have a wall which is a party wall as to part of its height and not a party wall as to the rest of its height. They say that the word "wall" in s. 5, sub-s. 16, means the entire wall. In order to test that argument I have read into that sub-section the words which they invite us to insert in order to appreciate their contention. The sub-section would then read thus: "The expression 'party wall' means (*a*) a wall forming part of a building and used or constructed to be used in any part of its length or height for separation of adjoining buildings." That, it is said, is the natural meaning of the words, and I think that there would be much force in that contention but for the fact that in s. 5, sub-s. 17, there are to be found the very words, or part of the very expression, which the appellants would have us insert into sub-s. 16. By sub-s. 17 a cross wall means a wall used or constructed to be used in any part of its height as an inner wall of a building, &c. To give full effect to all the language used, it is to be assumed that the

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words "in any part of its height," which are used in sub-s. 17 and are not used in sub-s. 16, were intentionally omitted from sub-s. 16. The effect of that would be to read the word "wall" in sub-s. 16 as meaning an entire wall; and party wall would mean an entire wall which for its whole height and length is used or constructed to be used for separation of adjoining buildings—a reading of s. 5 which would exclude a large number of walls which before the Act were regarded as party walls, including the wall in question.

I come now to s. 58. The appellants contend that this is a limiting section. To give effect to that contention they admit that they must read into it the word "only" after the words "for such part of its length"; they contend that under s. 5, sub-s. 16, the mere fact that a wall is used as to part of its height or length for separation of adjoining buildings constitutes it a party wall for its whole extent, and that s. 58 is introduced to make it a party wall for such part of its length only as is so used. The objection to this interpretation is that the word "only" is not there. My reading of s. 58 is not that it is a limiting section, but a section introduced to include that class of walls which according to my construction of s. 5, sub-s. 16, would be excluded. Accordingly I read s. 58 in this way: by substituting for the expression "as a party wall" the meaning ascribed to it by s. 5, sub-s. 16, namely, "for the separation of adjoining buildings." Sect. 58 would then run thus: "In either of the following cases—(*a*) When a wall is after the commencement of this Act built for the separation of adjoining buildings in any part"—that would include any part of its height as well as any part of its length—"the wall shall be deemed a party wall for such part of its length as is so used"; that is to say, "for the height to which it is a party wall it shall be deemed a party wall and for such part of its length as is so used it shall be deemed a party wall." I read s. 58 (*b*) in the same way. This interpretation seems to me to give effect to the language of s. 5, sub-s. 17, and to interpret s. 58 without introducing into it any words which are not there. It includes in the term "party wall" all walls which were understood to be party walls at the time of the passing of the Act of 1894, and it gives the natural meaning to the language used in

that Act. For these reasons I come to the conclusion that the contention of the appellants is not right, but that it is possible to have a wall which is, as to part of its height, a party wall within the Act, and which as to the remaining part of its height is not a party wall. I agree, therefore, that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors for appellants: *Cattarns & Cattarns.*
Solicitor for respondents: *Lewis W. Taylor.*

W. H. G.

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## MINTURN *v.* BARRY AND OTHERS.

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*March* 22.

*London—Building—Party Wall—"Party structure defective or out of repair" —London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 88.

By s. 88 of the London Building Act, 1894, a building owner as defined by s. 5 has a right to make good, underpin, or repair any party structure which is defective or out of repair:—

*Held*, that a wall which has become a party structure within the meaning of the Act, although originally built for other purposes and still sufficient for those purposes, may from dampness or other causes be as a party structure defective within the meaning of s. 88.

APPEAL from the West London (Brompton) County Court.

By s. 88 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), a building owner has the following rights in relation to party structures:—(1.) A right to make good underpin or repair any party structure which is defective or out of repair . . . . (11.) A right to perform any other necessary works incident to the connection of a party structure with the premises adjoining thereto.

By s. 90, sub-s. 1, a building owner shall not except with the consent in writing of the adjoining owner exercise any of his rights under the Act in relation to any party wall or party structure unless within the time specified he has served on the adjoining owner a party wall or party structure notice stating

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the nature and particulars of the proposed work and the time at which the work is proposed to be commenced.

By s. 91, sub-s. 1, where a difference arises between a building owner and adjoining owner in respect of any matter arising with reference to any work to which any notice given under this part of the Act relates unless both parties concur in the appointment of one surveyor they shall each appoint a surveyor and the two surveyors so appointed shall select a third surveyor and such one surveyor or three surveyors or any two of them shall settle any matter from time to time during the continuance of any work to which the notice relates in dispute between such building and adjoining owner with power by his or their award to determine the right to do and the time and manner of doing any work and generally any other matter arising out of or incidental to such difference . . . .

By sub-s. 2, Any award given by such one surveyor or by such three surveyors or by any two of them shall be conclusive and shall not be questioned in any Court with this exception that either of the parties to the difference may appeal therefrom to the county court within fourteen days from the date of the delivery of the award and the county court may subject as thereinafter mentioned rescind the award or modify it in such manner as it thinks just.

The plaintiff was the freeholder of a house, No. 14, Chelsea Embankment, and a building owner within the meaning of s. 5 of the Act. The defendants Sir J. Wolfe Barry and the London County Council were respectively the tenant and the freeholders of the adjoining house, No. 15, Chelsea Embankment, and were adjoining owners within the meaning of the Act.

The plaintiff alleged that No. 14 was being injuriously affected by dampness, which, as she alleged, came through the party wall between No. 14 and No. 15, and rendered uninhabitable several rooms in the basement of No. 14. This party wall had been originally built as a garden wall, and was not then intended to be, although it had by subsequent user become, the party wall of adjoining buildings. The wall at the date of these proceedings was still sufficient for the purposes for which it had originally been built.

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On June 2, 1910, the plaintiff gave to the defendants a party structure notice, stating that she intended after the expiration of two months to exercise the rights given to her under s. 88 of the London Building Act, 1894, and, among other things, to enter upon No. 15, dig down to the foundations of the party wall, and, if there were no damp proof course, insert a horizontal damp proof course for the full thickness of the wall, and build upon the defendants' premises a vertical damp proof course; also to repoint the brickwork and construct a weather joint on the defendants' side.

A difference having arisen between the plaintiff as building owner and the defendants as adjoining owners within the meaning of s. 91 of the Act, each party appointed a surveyor; these two surveyors selected Sir Alexander Stenning to act as third surveyor; and the three surveyors awarded and determined that the party wall was not so far defective or out of repair as to necessitate any works being executed under a party structure notice, and ordered the plaintiff to pay the costs of the award.

The plaintiff appealed to the county court under s. 91, sub-s. 2, of the Act. The county court judge came to the conclusion that the party structure notice was bad on the ground that it amounted to a claim to rebuild the plaintiff's premises with modern improvements which were not in existence when the houses were built; he held that to give to the word "defective" in s. 88, sub-s. 1, of the Act the meaning of "non-effective" was to give it too wide a meaning and one which would involve alterations and additions which had only come to be considered desirable and necessary since the passing of the Act. The learned judge concluded with these words: "The view I take of the words 'defective or out of repair' is of a much more limited character, and in my judgment the work required in the notice to be done was not of such a character that it could be called 'making good or repairing.' In these circumstances I come to the conclusion that this party structure notice was bad, and that in consequence of the character of the work required to be done it was not a notice within the powers or provisions of the Act." He therefore gave judgment for the defendants.

The plaintiff appealed.

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*Dickens*, K.C., and *Willoughby Williams*, for the appellant. Both the surveyors and the county court judge have held that a wall originally built as a garden wall and sufficient to answer the purposes of a garden wall cannot in law be defective or out of repair within the meaning of s. 88, sub-s. 1, of the Act as a party structure. But it is plain that however effective a wall may be as a garden wall it may be defective as a party wall. Whether it is or is not in fact defective as a party wall is a question for the surveyors or on appeal for the county court judge, but that question has never been decided.

[They were stopped.]

*E. Church Bliss*, for the respondent Sir J. Wolfe Barry, and *Daldy*, for the respondents the London County Council. The appellant in effect is claiming to have a new party wall built and to charge the respondents with a proportion of the cost of building it under s. 87. It is not alleged that this wall is out of repair. It is said to be defective; but it is not defective for the purpose for which it was built. It requires something more than dampness to make a wall defective. If a person chooses to make use of a garden wall as a party wall he must take it as he finds it. Furthermore, the only power which the county court judge has under s. 91, sub-s. 2, is to rescind or modify the award of the surveyors; he cannot alter the award so as to make it bear more hardly on the respondent.

Counsel for the appellant was not heard in reply.

PHILLIMORE J. This case must go back to the county court judge. On the matter being opened in that Court, an objection was taken which prevailed in the opinion of the judge. The building owner alleged that a certain wall, which has become by an indirect process a party wall, was defective or out of repair; and she offered to produce much evidence to shew that the wall was defective, inasmuch as being the party wall of a house it let in damp freely. I have much sympathy with the adjoining owner, because this wall was only defective as the wall of a house; probably it was originally a garden wall and as such quite sufficient and it fails now because it is put to a test which it was never intended to stand. But as a party wall of a house it is defective.

Just as, if it had originally been pointed with cement which had fallen away, it would be out of repair, so now it is defective because it has never had such treatment. At any rate that is a question which the parties are entitled to have tried. The surveyors who made the award in this matter seem to have come to the conclusion that the wall was not defective because they took the view that no wall which was structurally strong enough to bear the weight imposed upon it and sufficiently continuous to withstand the access of wind and rain from without could be called defective. If so, we must disagree with them. If their view was that the wall did not in fact let in damp, that is a question which the building owner was entitled to have tried on appeal in the county court. That seems to be the conclusion of this matter. If a party wall is defective, whether because it lets in the damp or for other reasons, and the defect can be cured by means contemplated by the Act, a party notice may be given; the building owner and adjoining owner become parties to the proceeding; the question comes before surveyors. If a decision is given which one party does not like, that party may appeal to the county court and the decision may be rescinded or modified. Even assuming that the county court judge cannot of himself make an award which presses upon the adjoining owner more hardly than did the award appealed from, he may at any rate rescind the award, and the matter must then be tried over again. I think myself that the county court judge may make the award which the surveyors ought to have made, which may be harder upon either the building owner or the adjoining owner than the award which was actually given. But we are not called upon to decide that. The question we have to determine is whether dampness in a sufficient degree makes a wall defective. In my opinion it does. This appeal must therefore be allowed.

BANKES J. It is unfortunate that this matter has come before us in this way. We have to deal with a wall which separates two houses and is admittedly a party wall. A dispute arose; each party appointed a surveyor; the two surveyors selected a third; and these three surveyors have made an award. It was competent for the surveyors to hold that the extent of the dampness

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was not such as to make the wall defective, and that the nature of the defect or want of repair was not such as to justify any of the proposed works. It was open to them to say that, having regard to the previous history of the wall, no work should be done on the adjoining owners' side, if it could be done on the side of the building owner. It is not clear what view they took; they may have assented to the argument that no amount of damp could make a wall defective, if it was sufficient for the purposes for which it was originally built. If that was their view I think they were wrong. They may, on the other hand, have thought that, having regard to the character of the defect, none of the proposed works were really necessary. If that was their view, it might have been sustained. But the county court judge has never directed his mind to that question. He stopped the case because he thought that no amount of damp could make a wall defective assuming it was not defective for the purpose for which it was made. As a matter of law I do not agree. It was open to the surveyors or the county court judge to say that this was a defective wall, and then to order such steps to be taken as they thought necessary and proper having regard to the previous history of the wall, what has since happened, and its present condition. For these reasons I agree that this appeal must be allowed.

*Appeal allowed.*

Solicitors for appellant: *Wadeson & Malleson.*
Solicitors for Sir J. Wolfe Barry: *Hopgood & Dowsons.*
Solicitor for the London County Council: *E. Tanner.*

W. H. G.

MOSES, APPELLANT *v.* RAYWOOD, RESPONDENT. 1911 *March* 21.

*Fishery Acts—Salmon—"Using net for catching salmon"—Net ready in Boat—Net not put into the Water—Salmon Fishery Act*, 1865 (28 & 29 *Vict. c.* 121), *s.* 36.

By s. 36 of the Salmon Fishery Act, 1865, any person "using" within a fishery district "any . . . . net . . . . for catching salmon," without having a licence, shall be liable to a penalty.

The respondent, who was in a boat with another man in a river in a fishery district where salmon were usually caught, got out of the boat and walked near the edge of the river looking for salmon. A click net, in size and shape resembling a landing net, was in the boat for the purpose of being put into the water when a salmon was seen near the surface. The respondent had no licence to use the net, and when interrupted by a water bailiff the net was dry, not having been put into the water. Upon an information charging the respondent with having used the net for catching salmon without having a licence, contrary to s. 36 of the Salmon Fishery Act, 1865, the justices held that there was no evidence that the net was "used" for catching salmon and dismissed the information:—

*Held*, that, as the respondent had begun to search for salmon and had the net with him ready for use, he was "using" the net for catching salmon within the meaning of the section, though he had not actually put the net into the water.

CASE stated by justices of the East Riding of Yorkshire.

At a petty sessions holden on September 24, 1910, an information was preferred by the appellant, a water bailiff in the employment of the Yorkshire Fishery Board, against the respondent under s. 36 of the Salmon Fishery Act, 1865 (1), for that he on August 24, 1910, between the parishes of Swinefleet, in the West Riding, and Saltmarshe, in the East Riding of Yorkshire, in the river Ouse, the said river being within the Yorkshire Fishery District, did unlawfully use a certain net, to wit, a click net, not being a rod and line, for catching salmon, without having a proper licence for the same.

(1) 28 & 29 Vict. c. 121, s. 36: "From and after a time to be appointed as aforesaid in a fishery district, any person using within that district any fishing weir, fishing mill-dam, putt, putcher, net, or other instrument or device, not being a rod and line, for catching salmon, without having a proper licence for the same, shall be liable to a penalty of not less than double the amount to be paid for the requisite licence, and not exceeding twenty pounds."

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Upon the hearing of the information the following facts were proved or admitted :—

On August 24, 1910, about 3 P.M., the respondent was in a boat with another man on the river Ouse at or near a place known as Goole Ness, which is on the East Riding side of the river opposite Goole.

The appellant watched the boat from Goole pier, and saw the respondent get out of the boat after taking off his boots and stockings and commence to range the ness on foot.

The appellant thereupon procured a boat and rowed across to the respondent's boat. The respondent was still walking along the foreshore and close to the water's edge with his boots and stockings off. The appellant searched the respondent's boat and found a click net, which in size and shape resembled a landing net, lying in the stern of the boat. The net was quite dry, and to all appearances had not been used that day.

The respondent had not a licence to use the net, and said that he did not know that the net was in the boat. He admitted that the boat was his, but denied that the net belonged to him or that he was using it for catching salmon, but said that he was looking for flatties, a freshwater fish to be found in the river at the place in question.

The appellant did not see the respondent actually use the net or make any attempt at using it, but he stated that the respondent and his companion were using the boat in the same way as any licensed salmon fisherman would usually do when on the look-out for salmon.

The respondent gave a wrong name and address to the appellant, but was subsequently identified.

The part of the river Ouse where the net was alleged to have been used by the respondent was within the limits of the Yorkshire Fishery District as defined by the certificate of the Board of Trade, dated January 21, 1896, under the powers conferred by s. 3 of the Salmon and Freshwater Fisheries Act, 1886 (49 & 50 Vict. c. 39), and salmon were usually caught there on the surface by means of a net known as a click net, hereinbefore described. The licence duty payable to the fishery board for each and every click net used within that part of the district

was, according to the scale issued by the board and approved by the Board of Trade under the Salmon and Freshwater Fisheries Acts, 3*l*.

It was contended on behalf of the appellant on the foregoing facts that the respondent had "used" the net for catching salmon without having a licence within the meaning of s. 36 of the Salmon Fishery Act, 1865, and *Lyne* v. *Leonard* (1) and *Short* v. *Bastard* (2) were relied upon in support of this contention. The justices pointed out that in the former case the putts were actually set in a salmon fishery, and in the latter case the net was shot and landed several times in places where salmon were actually caught, and that the cases did not decide what constituted a "user" within the meaning of the Act.

The respondent on being charged pleaded guilty, but after hearing the evidence of the appellant the justices came to the conclusion that the mere fact of the respondent having been seen in a boat on a river in which salmon were usually caught in company with another man and with a net on board, and being also on the occasion in question seen walking along the ness with his boots and stockings off as though on the look-out for salmon, did not constitute the offence of "using a net for catching salmon" within the meaning of the Act, especially as the net was quite dry and in the stern of the boat, whereas salmon fishermen intending to use a net for taking salmon usually carry the same in the bow of the boat. The justices, being of opinion that there was no evidence of user, advised the respondent to withdraw his plea of guilty, which he did, and he pleaded not guilty, and the justices dismissed the information.

The question for the opinion of the Court was whether the net was used by the respondent for catching salmon within the meaning of s. 36 of the Salmon Fishery Act, 1865, and whether the justices on the above statement of facts came to a correct determination in point of law.

*Willis Bund*, for the appellant. The justices were wrong in holding that, because the net was dry and had not apparently been put into the water, there was no evidence that the respondent

(1) (1868) L. R. 3 Q. B. 156. (2) (1881) 46 J. P. 580.

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was "using" the net for catching salmon. The respondent was in the boat for the purpose of catching salmon, and had already begun to search the river for them, having the net in the boat ready to use for the purpose. Though he had not actually put the net into the water, he was then "using" the net for catching salmon within the meaning of s. 36 of the Salmon Fishery Act, 1865. The respondent by his original plea of guilty admitted that he was using the net for catching salmon.

The respondent did not appear.

LORD ALVERSTONE C.J. In my opinion, inasmuch as the net was in the boat ready for use, and as the respondent admitted that he was there for the purpose of catching salmon, the justices ought not to have acquitted him merely because he had not actually put the net into the water. I understand that this is a net which is not kept in the water all the time, but is put into the water when a salmon is seen near the surface. The justices decided the case upon the narrow ground that the net was not wet, thus shewing that it had not been put into the water. Having regard to the respondent's plea of guilty and to the fact that the net was in the boat with the respondent, who was looking for salmon, the justices ought to have convicted him. The case will therefore be remitted to them for that purpose.

RIDLEY J. I am of the same opinion.

CHANNELL J. I am of the same opinion. The respondent had begun the process of catching salmon by searching the river, and he had in the boat with him a net wherewith to catch the salmon. In my opinion he was then "using" the net for catching salmon within the meaning of s. 36 of the Salmon Fishery Act, 1865, and the fact that the net was not wet, thus shewing that it had not been actually put into the water, was immaterial.

*Appeal allowed, and case remitted to justices.*

Solicitors for appellant: *Stevenson & Couldwell, for J. Edmund Jones, York.*

W. F. B.

[IN THE COURT OF APPEAL.]

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## GRIFFITHS *v.* ECCLES PROVIDENT, INDUSTRIAL, CO-OPERATIVE SOCIETY, LIMITED.

*Industrial and Provident Society—Nomination of Person to whom Member's Property in the Society shall be transferred—Limitation of Amount, to what Date referable—Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict.* c. 39), *s.* 25.

The Industrial and Provident Societies Act, 1893, s. 25, sub-s. 1, provides that "a member of a registered society may . . . . by a writing under his hand . . . . nominate . . . . any person or persons . . . . to or among whom his property in the society . . . . shall be transferred at his decease, provided the amount credited to him in the books of the society does not 'then' exceed one hundred pounds sterling."

At the time of a nomination made by a member of an industrial and provident society under the above-mentioned sub-section the amount credited to him in the books of the society did not exceed 100*l.*, but at his decease the amount so credited to him exceeded that sum:—

*Held* (by Vaughan Williams L.J. and Kennedy L.J., Farwell L.J. dissenting), that the word "then" in the above-mentioned sub-section refers to the time of the nomination, and not that of the member's decease, and therefore the nomination held good.

Appeal from the judgment of Avory J. in an action tried by him without a jury.

The claim indorsed on the writ was "against the defendants, as a society duly registered under the Industrial and Provident Societies Act, 1893, for the transfer or payment to the plaintiff under ss. 25 and 26 of the said Act of certain moneys in the defendant society under a nomination in writing dated April 1, 1909, under the hand of James Parry, a member of the defendant society, delivered at or sent to the registered office of the society, the amount credited to the said James Parry in the books of the defendant society not exceeding 100*l.*, to which the plaintiff (not being an officer or servant of the defendant society) became entitled on the death of the said James Parry on February 3, 1910, and of whose death satisfactory proof has been received by the defendant society."

The statement of claim, so far as material, alleged that on April 1, 1909, one James Parry was a member of the defendant society, and there was standing to his credit in the books of the said society a sum not exceeding 100*l.*, to wit 98*l.* 13*s.*; that on

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that date the said James Parry, under s. 25, sub-s. 1, of the before-mentioned Act, duly nominated the plaintiff as the person to whom the said property in the said society of him the said James Parry should be transferred at his decease; that the said James Parry died on February 3, 1910; and that the defendants refused to transfer the property comprised in the said nomination to the plaintiff or to pay the plaintiff the value thereof as directed by the said Act; and the plaintiff claimed (1.) transfer to him of the said property; (2.) alternatively, payment to him of the full value thereof.

The defendants' statement of defence, in substance, stated that at the death of the said James Parry there was standing to his credit in their books a sum exceeding 100*l.*, namely, 103*l.* 6*s.* 7*d.*, and therefore the nomination was invalid.

At the date of the nomination the amount which stood to the credit of James Parry in the defendants' books was 98*l.* 13*s.*, but at the time of his decease the sum so standing to his credit was 103*l.* 6*s.* 7*d.* It appeared that of this latter sum the amount by which it exceeded the sum of 98*l.* 13*s.* consisted of interest which had accrued on money lent to the society by the deceased member. During the argument in the Court of Appeal it appeared on reference to the rules of the society that provision was thereby made for the conversion of such interest, if not drawn by the member, after a certain time, into shares in the society, but there was apparently no evidence before the Court below as to whether or not in the present case the interest had been so converted into shares.

The nomination, which was in a printed form, was, so far as material, as follows: by it the said James Parry nominated "the following as the only person . . . . to . . . . whom shall be transferred my property in the society, whether in shares, loans, or deposits, at my decease in such proportion as is set forth below . . . .

| Name. | Description or Occupation. | Address. | Proportion. |
|---|---|---|---|
| George Griffiths. | Son-in-law. | 5, Ivy Bank, Claremont Road. | All. " |

The learned judge held that the word "then" in the last sentence of the before-mentioned sub-section referred to the date of the nomination, and not the date of the nominator's decease, and consequently the nomination was valid. He therefore gave judgment for the plaintiff. (1)

*C. A. Russell, K.C.*, and *Burgis*, for the defendants. The word "then" at the end of s. 25, sub-s. 1, of the Industrial and Provident Societies Act, 1893, refers to the date of the nominator's decease. The provisions of that section are intended to give a privilege to members of industrial and provident societies by enabling them to make what is in the nature of a testamentary disposition without the expense and trouble of making a will and obtaining probate of it. The intention obviously is to restrict that privilege to cases where the estate which would pass on the death of the nominator by the disposition does not exceed 100*l.* If the construction be adopted which attributes the word "then" to the time of the nomination, it would follow that, if the member's property in the society at that time did not exceed 100*l.*, whatever the amount of his property in the society at the time of his death might be, it would pass by the nomination. That cannot have been the intention. The amount which a member may have in shares in the society is limited by clause 5 of Sched. II. of the Act to 200*l.*, and the amount of his deposits is limited by s. 19, sub-s. 3, to 20*l.*; but by clause 6 of Sched. II. of the Act the amount which a member may lend to the society is to be fixed by the rules of the society, and there appears to be no limit as to amount, and therefore it

(1) Sect. 25, sub-s. 1, of the Industrial and Provident Societies Act, 1893, provides as follows:—"A member of a registered society, not being under the age of 16 years, may, by a writing under his hand, delivered at or sent to the registered office of the society during the lifetime of such member, or made in any book kept thereat, nominate any person or persons other than an officer or servant of the society (unless such officer or servant is the husband, wife, father, mother, child, brother, sister, nephew, or niece of the nominator) to or among whom his property in the society, whether in shares, loans, or deposits, or so much thereof as is specified in such nomination, if the nomination does not comprise the whole, shall be transferred at his decease, provided the amount credited to him in the books of the society does not then exceed one hundred pounds sterling."

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may exceed 100*l.* The Act of 1893 is a consolidating and amending Act, and it seems probable that the word "then," which was not in s. 11, sub-s. 5, of the previous Act on the same subject (39 & 40 Vict. c. 45), was inserted for the purpose of making it quite clear that the time intended to be referred to was the time of the member's decease, which might not have been so clear on the terms of the former Act. Industrial and provident societies are wholly different in character from friendly societies, being in the nature of co-operative trading concerns, and the provisions for nominations in the Friendly Societies Act, 1875, are couched in wholly different terms, so that the decisions upon that Act have no bearing upon the present case. The dictum of Gorell Barnes J. in *In the Goods of Baxter* (1), which was relied upon by Avory J. as concluding this case, was really obiter, and not necessary for the decision of the case. [They referred to the Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47).]

*F. W. Roe Ryecroft* (*G. Jessel Ryecroft* with him), for the plaintiff. The plaintiff contends that, upon the true construction of s. 25, sub-s. 1, of the Industrial and Provident Societies Act, 1893, the word "then" applies to the time when the nomination is made, the meaning being that, if at that time the member's property in the society does not exceed 100*l.*, he may make a nomination in respect of the whole or part of his property within that limit. The nomination so made can only affect his property in the society to that amount, namely, an amount not exceeding 100*l.* The nomination only contemplates the property which the nominator has in the society at its date. The result of the construction which the defendants seek to put on the sub-section would be that, if some trifling amount accrued due for interest on a loan made by the member to the society or by way of dividend on his shares, which might really happen unknown to the member, and that amount remained undrawn by him, and his property in the society were thereby made to exceed 100*l.* by a few shillings at the time of his death, the disposition by way of nomination which he had made for the benefit of his

(1) [1903] P. 12, 14.

wife or children or other relatives would become altogether void. Upon the construction of the sub-section contended for by the defendants it would be impossible to say whether a nomination was good until the death of the nominator. In *Bennett* v. *Slater* (1) a similar question arose upon s. 15, sub-s. 3, of the Friendly Societies Act, 1875, the provisions of which are analogous to those of s. 25, sub-s. 1, of the Industrial and Provident Societies Act, 1893, and it was held that the nomination in that case was valid, although the total amount payable by the society on the death of the nominator exceeded 100*l.* The limitation to the amount of 100*l.* takes effect at the time when the power to nominate given by the section is brought into play. The nomination is in the nature of a settlement with a power of revocation in the manner specified in sub-s. 2 of s. 25. It is submitted that, unless and until the nominator so revokes the nomination, he cannot withdraw or dispose of the property in the society so made the subject of the nomination.

Secondly, it is clear that the limitation under sub-s. 1 of s. 25 only refers to the member's capital in the society. In this case the excess over 100*l.* was created by a sum becoming due for interest, which was not drawn by the nominator, and it was for the defendants to prove that under the rules this had been converted into capital, which they did not prove. Therefore on that ground the nomination must be held good. *In the Goods of Baxter* (2) is a clear authority in the plaintiff's favour. [He also cited *In re Redman* (3); *In re Griffin.* (4)]

*C. A. Russell, K.C.*, for the defendants, in reply. The second point taken for the plaintiff before this Court was not taken in the Court below; if it had been, the defendants would have been prepared to give the necessary proof of the facts. The case was argued throughout on the basis that at the time of the nominator's death his "property in the society" within the meaning of the sub-section exceeded 100*l.*, and that the sole question was whether, on the true construction of the sub-section, the limitation to 100*l.* applied to the time of the nomination or the death of the nominator. The language of the Friendly

(1) [1899] 1 Q. B. 45.
(2) [1903] P. 12.
(3) [1901] 2 Ch. 471.
(4) [1902] 1 Ch. 135.

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Societies Act, 1875, s. 15, sub-s. 3, is very different from that of the Industrial and Provident Societies Act, 1893, s. 25, sub-s. 1, and *Bennett* v. *Slater* (1) is therefore no authority upon the question in the present case. There is no analogy between a friendly society, the object of which is insurance in respect of death and sickness and other contingencies, and a society such as that here in question, which is in the nature of a co-operative trading concern.

VAUGHAN WILLIAMS L.J. There have been a good many decisions with respect to this beneficial process, by which Acts of Parliament have, subject to certain limitations and conditions, enabled members of friendly, and industrial, and such like societies to transfer their property in the society, in the shape of shares, loans, and deposits, in what is really a testamentary manner, without making a will, by means of a nomination, which on the death of the nominator takes effect. These societies are intended for people of a class which generally has but moderate means, and by the process in question they are relieved of a great deal of trouble and expense, and, to a certain extent, of the payment of duty. I think that, under the circumstances, the power of nomination being similar to a great extent under these Acts, it would not be right to say that we may not look at the decisions under the Friendly Societies Acts, and other Acts containing provisions in pari materia, to guide us in arriving at a conclusion as to the meaning of s. 25 of the Industrial and Provident Societies Act, 1893, which we have to construe. That section confers on members of industrial and provident societies a power of making such a nomination as I have mentioned. A power of making such a nomination was previously conferred by the Industrial and Provident Societies Act, 1876. I accept the statement of the defendants' counsel to the effect that industrial and provident societies are in the nature of trading societies, and of a character different from that of friendly societies, though the class of people intended to be benefited by them is clearly in each case one possessed only of moderate means. The Industrial and Provident Societies Act,

(1) [1899] 1 Q. B. 45.

1876, was, however, an Act dealing with subject-matters of the very same character as those which are dealt with by the Act of 1893. The section providing for nominations in the Act of 1893 differs in many respects from s. 11, sub-s. 5, of the Act of 1876. It is different not only in being shorter, but also in the frame of the section. That being so, one has to see to what extent any change was intended to be effected when s. 25 was substituted for the section in the former Act. What we have here to decide is the question whether the power of nomination is limited by the amount of the property in the society which it turns out that the nominator had at the time of his death, or by the amount of such property which he had at the time of the nomination. Now I venture to think that nobody could read s. 11, sub-s. 5, of the Act of 1876 without coming to the conclusion that under that sub-section it was intended that the power of nomination should be limited by reference to the amount of the nominator's property in the society at the time of the nomination and not by reference to the amount which he had at the time of his death. If that be so, I think that it was making an alteration of the greatest practical consequence, if s. 25 altered the time to which the limitation of amount was to refer from the time of the nomination to the time of death, which according to the argument of the defendants' counsel is the effect of the insertion of the word "then." Before passing to the terms of s. 25, I wish to say with regard to the decision in *In re Griffin* (1) that in that case there was no question of any competition between a nomination and an assignment. There was no nomination in that case, and the only question was whether, there being no nomination, there was a right of assignment as one of the methods of transferring property of this description, namely, shares, loans, and deposits in a society of this kind; and every member of the Court (of which I was a member) carefully avoided the application of their decision to a case in which there was a competition between a nomination and an assignment. We all limited our decision to the particular case before us.

I now come to s. 25, sub-s. 1. [The Lord Justice then read

(1) [1902] 1 Ch. 135.

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the sub-section.] Now, I can see no grammatical difficulty whatever in attributing the word "then" in the latter part of the sub-section to the words conferring authority to make the nomination at the beginning of it, and reading it thus: "a member of a registered society . . . . may by a writing under his hand . . . . nominate any person . . . . provided the amount credited to him in the books of the society does not then exceed one hundred pounds sterling." It is quite true that in the subordinate intervening sentence the word "decease" is used and the time of death is indicated. I see no reason why, as a matter of English grammar, the word "then" should be attributed to the time of "decease" which is mentioned in the subordinate sentence rather than to the words "may, &c.," that are in the first and principal sentence, which confers and defines the power given by the section, or why the section should not be read as meaning that the member may make a nomination under it if the amount standing to his credit, when he does so, does not exceed 100*l*. Difficulties have been suggested as likely to arise if one construction is given to the sub-section rather than the other. Upon consideration of them, I am of opinion that the practical difficulties in giving effect to this very beneficial section will be much greater if the word "then" is attributed to the time of death instead of to the time of the nomination. That is the view which was taken by Avory J. He came to the conclusion that s. 25, sub-s. 1, means that the amount credited to the member in the books of the society must not exceed 100*l*. at the time when he makes the nomination, and that that is the better grammatical construction of its language. I take the same view that he did as to the construction of the words, and I attribute the word "then" to the moment and fact of nomination. The view which I am taking is not a novel view, because in *In the Goods of Baxter* (1) this very question was raised and decided. Gorell Barnes J. said in that case: "In my judgment this document is testamentary. It fails, under the provisions of the Industrial Societies Act, 1893, to operate as a nomination paper. Under that Act, a member of the society may, by writing under his hand, nominate a person or persons to whom his interest in the society is to go after his death, provided

(1) [1903] P. 12, 14.

the amount credited to him in the books of the society does not then—that is, at the time he executes the nomination—exceed 100*l.* sterling." I do not say that the words of the section are not capable of two constructions; but, having regard, amongst other things, to the previous legislation in respect of the same matter, namely, the provision for nominations of this kind by members of these societies, who are generally people of moderate means, so as to avoid the expenses connected with a will, and taking into consideration the decisions upon the subject, I think it is impossible to suppose, without very much stronger and clearer words, that it was intended to make such an important alteration in the law with reference to the making of these nominations, as it stood before the passing of the Act of 1893, as would be involved by the construction of s. 25, sub-s. 1, contended for by the defendants. For these reasons I think that the decision of Avory J. should be affirmed.

There is another point which arises in the present case. I am clearly of opinion that the limitation in s. 25, sub-s. 1, only deals with shares, loans, and deposits, and does not deal with interest so long as it remains in the hands of the society qua interest. I think it was for the society to prove that the interest, which I understand to have constituted the excess over the sum of 100*l.*, had ceased to be interest and had been converted into shares. As I understand, there was no evidence whatever of this at the trial, but, although that might be a sufficient ground for deciding this case in favour of the plaintiff, I prefer, after the discussion which has taken place, to express my opinion as to the construction of s. 25. I think that this appeal must be dismissed.

FARWELL L.J. I regret that I am unable to agree with the view taken by the other members of the Court and Avory J. I need hardly say that I differ from them with some diffidence; but, the question being one of very considerable importance to these industrial and provident societies, I feel bound to express the opinion which I have formed. With regard to the last point mentioned by Vaughan Williams L.J., I find it impossible, in the face of the statement in the judgment of Avory J. that "at

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the date of his" (the nominator's) "death it is admitted that the amount credited to him in the books of the society amounted to a sum of 103*l.* 6*s.* 7*d.*," to say that it is open to us to avoid the real difficulty by deciding the case on the ground that the amount credited to the nominator in the books of the society at his decease was not proved to exceed 100*l.*

Sect. 25 of the Act of 1893, like several other sections of the same character in similar Acts, is in my opinion intended to confer a benefit on members of societies of this kind by giving them a limited power of disposition in its nature testamentary without the formality and expense of making a will or obtaining probate. The nomination in pursuance of such a power is, like any other testamentary disposition, revocable, as, under the Wills Act, a will is revocable, and, like a will, does not, prior to the nominator's death, affect his property, but leaves him free to deal with it as he pleases, either by withdrawing it in accordance with the rules of the society, or receiving payment of his loans to the society, without any power of interference by the nominee. The nominator is in the position of a testator, and the nominee of a legatee.

Reference has been made to the decision in *Bennett* v. *Slater* (1), under the Friendly Societies Act, 1875, the terms of which are to my mind quite different from the terms of the Act with which we are dealing in this case. The statements made in the judgments in that case ought not, in justice to the learned judges who decided it, to be taken as absolutely general. All that they were there dealing with was the question whether a nomination under the Friendly Societies Act, 1875, had been revoked by a general residuary gift in a will; and, following the rule applicable to powers of appointment (see *Pomfret* v. *Perring* (2)), such a general residuary gift would not operate as a revocation; and therefore the decision in that case, if I may say so with great respect, was perfectly right. Various phrases have been picked out and read to us from the judgments in that case, of which I will take one from the judgment of A. L. Smith L.J., which is as follows (3): "The

(1) [1899] 1 Q. B. 45. (2) (1854) 5 De G. M. & G. 775.
(3) [1899] 1 Q. B. 49.

second contention for the defendants was that the nomination was revoked by the will. With regard to that contention, I may in the first place remark that, where there has been a nomination as in the present case, until that nomination has been revoked, I think that the nominee, and not the nominator, is the person beneficially interested in the money; and therefore I find a difficulty in seeing how under a residuary bequest this money can be considered as included." I do not for a moment believe that the learned Lord Justice intended to assert that the right of alienation, which is the ordinary incident of property, was taken away because the man had exercised this power of nomination. I do not think that an ordinary incident of property, such as the right of alienation, can be so taken away.

The object of these enactments with regard to nominations of this kind is, in this and similar cases, to allow a sum of money to pass on death by this informal kind of testamentary disposition, and in all the Acts the amount which may be so dealt with is limited to 100*l*. Comparing the phraseology of the Friendly Societies Act, 1875, with that of the Industrial and Provident Societies Act, 1893, with which we are dealing, there is a great distinction between the two modes of procedure adopted in the two Acts respectively, and I think that which was adopted in the Friendly Societies Act, 1875, is much the best. Putting it shortly, that Act provides by s. 15, sub-s. 3, that a member of a society may, by writing under his hand, nominate any person to whom any moneys payable by the society on the death of such member, not exceeding 100*l*., shall be paid at his decease. That appears to me to be a lucid enactment, intelligibly framed, shewing that a member may by such a nomination give 100*l*. out of the money payable at his death. The form adopted in the Act of 1893, which in my opinion clearly makes the validity of an exercise of this testamentary power dependent on the amount credited to the member in the books of the society at his death, is to my mind a very much less convenient form, and one which may very often not carry out the intent of the parties, but I do not feel at liberty, when the Legislature has chosen in the case of the two kinds of societies to adopt two different forms, to strain the words in order to make one of them accord with the other. The two Acts are

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different, and I must take the Act of 1893 as I find it. To my mind the words of s. 25, sub-s. 1, of that Act do not really admit of the construction which Vaughan Williams L.J. has put upon them. The words of s. 25, sub-s. 1, so far as material, are, "A member of a registered society . . . . may, by a writing under his hand, . . . . nominate any person or persons . . . . to or among whom his property in the society . . . . shall be transferred at his decease, provided the amount credited to him in the books of the society does not then exceed one hundred pounds sterling." I confess that I cannot bring myself to say that the word "then" means anything but "at his decease." "At his decease" is the last antecedent; that is the time at which one would assume that the disposition is to take effect, and which appears to be the material time. What is the relevancy of the amount of 100*l.*, say, ten years before the man dies, to the date when the nomination is to take effect, namely, that of his death? If it were the fact that the member could not withdraw any of his money in the meantime, it might make a difference; but to my mind that is impossible, as I have already stated, and it seems futile to construe the Act as meaning that, because a man ten years ago had less than 100*l.* in the society, he can therefore dispose of his property in the society at his death, whatever its amount may be. If the words be read as making it a condition precedent to the right to nominate that the nominator's property in the society should not at the time of nomination exceed 100*l.*, the effect must be that the nomination will operate to transfer whatever property he may have in the society at his death, and not only that which he had ten years before. It may not even be the same property, because he may have drawn that out and spent it, and replaced it over and over again. I absolutely fail to see how the word "then" in the section can mean anything but at the time of his decease. The Act is dealing with the disposal of the man's property at his death, not at the date of the nomination, and is intended for the benefit of persons whose disposable property does not exceed 100*l.* Let me compare it to the case of a legatee of 1000*l.* under an ordinary will: he is not concerned with the amount of money that the testator had when

he made his will, but at his death: how does it profit him that his testator had 10,000*l.* at the former date, if he had nothing at his death? So the State, desiring to give benefits to persons disposing of small estates, is concerned not with the amount of each estate when appointed, but when paid over. I am fortified in my conclusion by the consideration that in the Act of 1876, which this Act amends, in the provision that the amount credited to the member must not exceed 50*l.*, afterwards increased by a subsequent Act to 100*l.*, the word "then" did not occur. It seems to have occurred to the Legislature that this was not quite clear, and therefore to make it so they inserted the word "then" in the corresponding section of the present Act. No draftsman who was at all afraid of tautology would have employed the phrase "shall be transferred at his decease, provided the amount credited to him in the books of the society does not at his decease exceed one hundred pounds sterling." The word "then" is the only natural word for the draftsman to have adopted. To my mind, apart from this, I think the Act admits only of one construction. I do not think that the provision in the Friendly Societies Act in pari materia really gives us any assistance, or has any bearing on this case. With regard to the case of *In the Goods of Baxter* (1), I would point out that the statement of Gorell Barnes J. was not necessary for his decision. The facts were that the nominator, the deceased, had both at the time of the nomination, and also at his death, more than 100*l.* in the society; and therefore it was quite immaterial for the purposes of the decision which date was taken. I cannot regard that statement of Gorell Barnes J., slipped in in that way, as an authority binding upon me, although, if he had considered the question at all, I should pay it all the respect due to anything that fell from that learned judge. I cannot come to the conclusion that the word "then" in the section means anything but "at his decease," and therefore I think that the nomination in this case must fail for that reason.

KENNEDY L.J. I agree with the judgment pronounced by Vaughan Williams L.J. in this case. I need hardly say that,

(1) [1903] P. 12.

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having regard to the fact that my brother Farwell differs from that judgment, I express the opinion which I have formed with some diffidence. It seems to me, if I may say so with respect, that the fault of the view of the sub-section which he adopts is that it treats the words "to or among whom his property in the society shall be transferred at his decease" as indicating an act in futuro distinct from the nomination, whereas it is, I think, the better view that under the sub-section those words depend upon and form part of the nomination which takes place in præsenti. The form of the nomination is that the member nominates A. B. as the "person to whom his property in the society shall be transferred at his decease." The words "to whom . . . . shall be transferred" cannot, I think, be construed as referring to the time of an act in futuro, by which, after the nomination, on the decease of the nominator, the property shall be transferred, but are words of intention; and so reading the section it is impossible to treat the word "then" as referring to the time of the nominator's decease. The other view treats the effect of the sub-section as being that the member may nominate a person, and that afterwards at his death a certain event shall happen, i.e., the property shall be transferred to his nominee. I must say that, grammatically, that seems to me to be an unsound construction of the language. If the words "shall be transferred" could be read with reference to the act of transferring in time future, taking place after the nomination, it might be preferable to read the word "then" as referring to the time of decease, but I think that those words define and are part of the nomination, to make which power is given, and, upon that construction, the words "does not then exceed" appear more naturally to refer to the time of the nomination and qualify the general power that otherwise would be given by the sub-section.

Moreover, although, I admit, one cannot always expect grammatical exactness in an Act of Parliament, I think that, as a matter of grammar, the interpretation which has been placed by my brother Farwell upon the sub-section involves an awkward use of the words "does not": the words, if they were meant to refer to a future period of time, should rather have been,

"provided that the amount credited to him in the books of the society 'shall' not then exceed 100*l.*" I would point out that, if the construction had been intended to be that for which the defendants contend, it would have been very easy for the draftsman to have prevented any difficulty by saying "provided the amount credited to him shall not at the time of such decease," i.e., when the property comes to be dealt with, "exceed 100*l.* sterling." To my mind, the framework of the sub-section indicates that the intention was to give a power to nominate a person or persons to or among whom by the nomination the nominator's property in the society shall be transferred, provided that that power shall be exercised only if at the time of nomination, to which the words "does not" refer, the amount credited does not exceed 100*l.* Further, I think that, in construing an Act of Parliament, one ought not, if one can help it, to prefer a construction which, I confess, seems to me to lead to an unintelligible result; because, on the other view of the section, I think a draftsman must have foreseen that the result might be that, if on the nominator's decease the sum of 100*l.* was exceeded by, it may be, a sum of one penny, which might possibly happen without his knowledge through the accrual of interest, or something of that kind, the provision that a poor man had carefully made for the division of his 100*l.* between his children, without the trouble and expense of making a will and obtaining probate of it, would be upset. I am unwilling to suppose that it could have been intended to make a provision which would admit of such a result. On the other hand, with the greatest respect, I cannot attribute much weight to the difficulty which is suggested on the other side. Supposing for a moment that the nominator, having had only 100*l.* at the time of the nomination, at the time of his decease had 150*l.*, the whole operation of the nomination, I should say, would be confined ab initio to the 100*l.*, and the nomination would be good for that amount only. If my view is right, it does not matter if the amount which the nominator has in the society rises greatly above the 100*l.*, because the words "all my property," or whatever might be the words of the nomination, would be confined by the terms of the section to

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the 100*l.*, with which alone he had power to deal under the section.

I need not go through the authorities which have been referred to at length. There is the clear authority of the opinion expressed by Gorell Barnes J. in *In the Goods of Baxter* (1), whether necessary to the decision in that case or not. With regard to the case of *Bennett* v. *Slater* (2), I do not think that the decision there can be treated as governing the present case, because it was decided upon another Act, the language of which was different; but it may be observed nevertheless, when one is considering the application of the section in this case on the view of it which I am adopting, that a similar view commended itself to the Court in that case as an intelligible and sound view of the wording of a section of a similar description, though not in exactly the same terms, in the Act of 1875. I could not treat that case as an authority for the construction of the present section, but I may fairly argue that the Court, in dealing with the section there in question, treated it as reasonable that there should be a power to make a nomination of this kind in respect of property which the nominator might then possess in the society to the extent of 100*l.*, which should take effect upon his death, although at that time his property in the society might exceed that sum. With regard to the case of *In re Griffin* (3), I do not think that the decision there affects the view which I am taking in the present case. All the Lords Justices pointed out in that case that they were not deciding what would be the effect of a conflict between a nomination and a subsequent assignment. What would happen if a man had made and did not revoke a nomination, and the Court had to deal with the case of a nomination and an assignment in conflict with it, it is unnecessary in the present case to consider. On the whole, though, as I have said, I can only express my opinion with considerable diffidence, I think that there is a clear balance both on the question of the natural construction of the words of the section and in point of practical convenience in favour of the view which has commended itself to Avory J. as it did to Gorell Barnes J. It seems to me that

(1) [1903] P. 12. (2) [1899] 1 Q. B. 45.
(3) [1902] 1 Ch. 135.

under the section, if the property of the nominator in the society increases after the nomination so as to exceed 100*l.*, the nomination will operate only for the 100*l.*, because the law has said that that is to be the limit of the property at the time when the nomination is made, and the society therefore, as I suppose, will not accept a nomination so far as it purports to do more than give a right to the sum of 100*l.*

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*Appeal dismissed.*

Solicitors for plaintiff: *Braikenridge & Edwards, for H. Gilman Jones, Salford.*

Solicitors for defendants: *Bower, Cotton & Bower, for Aston, Harwood & Somers, Manchester.*

E. L.

*Applied.* HESKELL *v.* CONTINENTAL EXPRESS, LTD. [1950] 1 All E.R. 1033.

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[IN THE COURT OF APPEAL.]

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## RANSON *v.* PLATT.

*Bailment—Warehouseman—Negligence—Claim by Third Party to Goods bailed—Duty of Bailee—Notice of Claim to Bailor—Order by Magistrate that Goods be delivered to Third Party—Effect of—Metropolitan Police Courts Act*, 1839 (2 & 3 *Vict. c.* 71), *s.* 40.

The plaintiff, a married woman living apart from her husband, deposited certain goods belonging to her with the defendant, a warehouseman, the charge to be made by the defendant for the storage of the goods being agreed between the plaintiff and the defendant. The plaintiff gave her address to the defendant. The plaintiff's husband subsequently went to the defendant's premises and claimed to be the owner of the goods, and, upon the defendant refusing to deliver them to him except under a magistrate's order, the husband and a representative of the defendant attended before a magistrate. The defendant's representative informed the magistrate that the goods had been deposited with the defendant by the plaintiff and that therefore the defendant for his protection required an order of the magistrate that he should deliver the goods to the husband. Thereupon a summons was issued by the magistrate under s. 40 of the Metropolitan Police Courts Act, 1839, against the defendant. The defendant did not give notice to the plaintiff of the husband's claim to the goods or of the issue of the summons. At the hearing of the summons the husband swore that he was the owner of the goods and that they were worth 10*l.*, and the magistrate thereupon made an order that the defendant should

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deliver the goods to the husband. The defendant accordingly delivered the goods to the husband, and the next day wrote to the plaintiff informing her that the goods had been removed by order of a magistrate. The plaintiff subsequently brought an action in the county court claiming from the defendant the return of the goods or their value and damages for their detention, and the county court judge directed the jury that the defendant would be responsible for the loss of the goods if he by his negligence allowed the magistrate's order to be made without giving notice to the plaintiff, whose address he knew, of her husband's claim to the goods or asking the magistrate to summon the plaintiff before him so that she might be heard. The jury found that there was negligence on the part of the defendant :—

*Held* (reversing the decision of a Divisional Court), that there had been a failure on the part of the defendant to fulfil his obligations as a bailee, and that he could not rely for protection upon the order made by the magistrate, and therefore the plaintiff was entitled to judgment.

APPEAL from the judgment of a Divisional Court (Darling J., Phillimore J., and Bucknill J., the first mentioned doubting) on an appeal from a judgment of the judge of the Brompton County Court as after mentioned. (1)

The material facts were as follows. The plaintiff was a married woman, living apart from her husband. On March 30, 1910, the defendant Platt, who was a warehouseman, removed at the plaintiff's request certain furniture belonging to her from a house, 4, Applegarth Road, West Kensington, and warehoused them at his premises for storage. The charges to be paid by the plaintiff for the removal and storage of the goods were agreed between her and the defendant. The plaintiff gave 132, Blythe Road, West Kensington, as her future address to the defendant's men who removed the goods.

On April 8, 1910, a man (who proved to be the plaintiff's husband) called at the defendant's premises and told the defendant's manager that the goods which the plaintiff had warehoused belonged to him and had been removed from 4, Applegarth Road by the plaintiff without his knowledge. He further said that he wanted them back to make a home for his children. The defendant's manager replied that he could not give up the goods without the plaintiff's authority, and advised the husband to go and discuss the matter with her, at the same

(1) Reported [1911] 1 K. B. 499.

time giving him the address 132, Blythe Road as that at which the plaintiff could be found. On April 9, 1910, the husband again went to the defendant's premises and told the defendant's manager he had been to 132, Blythe Road, but that he was there informed that his wife was not known, and that he had not been able to find her. He added that he had been to the police court and that the magistrate had told him to go to the defendant and demand the goods. The defendant's manager replied that he could not give up the goods without a magistrate's order, whereupon the husband remarked that the magistrate had said that if the defendant did not give up the goods a summons would be issued. The defendant's manager thereupon instructed his assistant manager, one Cameron, to go with the husband to the police court. Accordingly the husband and Cameron went to the West London Police Court, and in reply to a question by the magistrate the husband swore that the defendant refused to give up the goods without an order. In answer to questions put to him by the magistrate as to why the defendant so refused, Cameron replied that the goods had been warehoused in the plaintiff's name and that therefore the defendant could not give up the goods without her consent, and that the defendant wanted an order for his protection. A summons was accordingly issued from the police court under s. 40 of the Metropolitan Police Courts Act, 1839, by which the defendant was called upon to shew cause why an order should not be made upon him to deliver the goods to the husband, and on April 13, the return day, Cameron, by the defendant's order, attended at the police court. The defendant instructed Cameron to obey any order made by the magistrate, and that, if the magistrate held that the goods belonged to the husband, he (Cameron) must give them up to him. Before the magistrate the husband swore that he had been to 132, Blythe Road, and that the plaintiff was not known there, and that he was the owner of the goods (except a few articles which he did not claim), which were worth 10*l.* Cameron told the magistrate that the defendant would give up the goods claimed by the husband if the magistrate was satisfied as to his title to them. The magistrate thereupon adjudged the goods to be of the value of 10*l.* and made an order for their delivery by the

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defendant to the husband upon payment of the defendant's charges. Cameron left the police court with the husband, and the husband then told Cameron that he wanted to remove the goods, but that he had no money to pay the defendant's charges. He asked Cameron to buy some of the goods to cover the defendant's charges and provide a little money in hand. After some demur Cameron agreed, and upon behalf of the defendant bought certain of the goods for 4*l.* 11*s.*, and delivered the remainder to an address given by the husband.

On April 14, 1910, the defendant wrote to the plaintiff saying that the goods had been removed by order of the magistrate. The plaintiff called at the defendant's premises on the same day, when the defendant's manager told her where the goods had been taken to, and that he had acted on a magistrate's order. He also told her that he still had some goods which the husband had not claimed and asked her for her address if she would like to have them sent there. She said she would wait for the present, and he then suggested that she should go to the magistrate. Accordingly on April 15 the plaintiff went to the police court, but the magistrate told her he could do nothing further, that her remedy was against her husband, and that it appeared that perjury had been committed.

The plaintiff then commenced the action in the county court. By her particulars of claim the plaintiff claimed the return and delivery up of the goods which she alleged the defendant had wrongfully detained and neglected to return after demand made for their delivery, or their value, and damages for their detention or damages for wrongful conversion of the same.

The trial took place with a jury, and the county court judge in summing up to the jury said that he must hold that an order properly obtained under s. 40 of the Metropolitan Police Courts Act, 1839, would protect the defendant as to the goods handed over to the plaintiff's husband, but that he thought that the defendant would be responsible for the loss of those goods to the plaintiff if he by his negligence allowed the order to be made without giving notice to the plaintiff, whose address he knew, or asking the magistrate to summon the plaintiff before him so that she might be heard.

The following are the questions which the county court judge then left to the jury and their answers thereto :—

1. Was the magistrate's order obtained through negligence on the part of the defendant? Answer: Yes.

2. If so, what damages do you assess for the loss of the goods handed over by him, and what damages for the loss of the use of those goods? Answer: 25*l.*

3. What value do you put on the goods purchased by defendant from Ranson, the husband? Answer: 10*l.*

4. What value on those which were never claimed by Ranson? Answer: 15*l.*

5. What damages for the detention of No. 2, and what for the detention of No. 3? Answer: 20*l.*

The county court judge thereupon gave judgment for the plaintiff for 70*l.* damages, to be reduced to 45*l.* upon delivery up by the defendant of the goods still in the defendant's possession.

The defendant appealed upon the grounds (inter alia)—

1. That the judge misdirected the jury in telling them that, if the order made by the magistrate was obtained by the plaintiff's husband through negligence on the part of the defendant, the defendant was liable to the plaintiff in damages for the loss of the goods delivered up in pursuance of the order.

2. That there was no evidence of negligence on the part of the defendant. (1)

The Divisional Court allowed the appeal. (2)

*C. A. Russell, K.C.*, and *W. R. Warren*, for the plaintiff. The only question which arises on this appeal is as regards the goods which were handed over to the husband. Apart from the provisions of the Metropolitan Police Courts Act, 1839, s. 40, the bailee of the furniture would have had only two alternatives open to him, either to take interpleader proceedings, or to hand over the goods at his own risk. The defence set up in this case was the order of the magistrate for the delivery of the goods to the husband. It is submitted that, having regard to the defendant's antecedent

(1) No question arose on the appeal with regard to the goods purchased by the defendant, it being admitted that the defendant was liable as regards those goods.

(2) [1911] 1 K. B. 499.

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breach of his duty as a bailee towards his bailor, that order cannot avail him as a defence. It was the duty of the defendant, as a bailee, under the circumstances, to give notice to the plaintiff of the hostile claim of the husband, and of the proceedings commenced by him to obtain possession of the furniture bailed. It is clearly the duty of a bailee to use reasonable diligence to protect the goods entrusted to his care, and that duty is just as applicable in a case where they are threatened by an adverse claim at law as where they are threatened with physical interference by a third party. It is not suggested that there was any collusion or fraud on the part of the defendant or his servants, but the latter took a wrong view of the situation as regards the measure of the duty imposed upon a bailee. In the present case the defendant, who knew the address at which the plaintiff could be found, as was shewn by the letter of April 14 reaching her, did not inform her of the taking out of the summons which seems to have taken place to some extent upon his servant's suggestion, and took no steps to defend her rights in respect of the goods before the police magistrate in any way, but allowed an order to be made for delivery of the goods to the husband behind her back, without making any effort, substantially, to prevent it. Under such circumstances the defendant is estopped from setting up the magistrate's order, which was really obtained in consequence of his failure to perform his obligations as a bailee. [They cited *Glyn, Mills, Currie & Co.* v. *East and West India Dock Co.* (1); *Ross* v. *Edwards* (2); *Ex parte Davies.* (3)]

*Leslie Scott, K.C.* (*Heber Hart* with him), for the defendant. There is no ground for saying that the police court proceedings were procured by the defendant or his servants. It cannot rightly be said that, as a matter of law, there was an absolute duty upon the defendant to give notice of the issue of the summons to the plaintiff. It is no doubt the duty of a bailee to take such steps as may be reasonable for the protection of the goods bailed to him, but it is contended that the defendant here was not guilty of any failure to do what was reasonable under the circumstances. His servant informed the magistrate who the bailor of the

(1) (1880) 5 Q. B. D. 129. (2) (1895) 73 L. T. 100.
(3) (1881) 19 Ch. D. 86.

goods was, and it was for the magistrate to determine what steps ought to be taken, and, if he thought it necessary, to adjourn the case for the attendance of the plaintiff. The husband told the defendant's servant that the furniture belonged to him, and had been removed by his wife from Applegarth Road without his knowledge. He also told the defendant's servant that he had been to the address given by the plaintiff and could not find her there. The defendant was not bound to assume that these statements of the husband were untrue. The husband repeated these statements on oath at the police court, and the magistrate was satisfied, and in his discretion made the order. It may be that he was wrong in so doing, but it was for him to decide the case. It is submitted that, so far as the defendant was concerned, he did all that he could reasonably be required to do under the circumstances, and that there was no breach of his duty as a bailee by him, nor any ground for holding that he was not protected by the order of the magistrate. As regards any claim in detinue or trover by the plaintiff, the defendant cannot be considered as unlawfully detaining, or as having wrongfully converted the goods, merely by reason of his having obeyed the order of a properly constituted tribunal for their delivery to the husband. Such a delivery did not constitute any exercise of dominion by the defendant over the goods inconsistent with the plaintiff's title. It is in the nature of an eviction by title paramount: *Biddle* v. *Bond.* (1)

[VAUGHAN WILLIAMS L.J. It may be that a person may be estopped by his conduct from taking advantage for his protection of such an order. A question of that kind was discussed in *Wood* v. *Dunn* (2) and *Allen* v. *Dundas.* (3)]

It is submitted that, whether the claim be regarded as one for wrongful detention or conversion or one for breach of the obligation of a bailee, there is not that causal nexus between the action of the defendant and the plaintiff's loss of the goods that would support the action. The efficient cause of the plaintiff's loss was really the order made in the exercise by the magistrate of his judicial discretion,

(1) (1865) 6 B. & S. 225. (2) (1866) L. R. 2 Q. B. 73.
(3) (1789) 3 T. R. 125.

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which cannot be regarded as having been caused by the defendant's conduct, and which the defendant was bound to obey. The delivery of the goods to the husband was really the act of an independent judicial tribunal, and it is not competent for the Court to go behind the order of that tribunal in the absence of fraud or collusion amounting to fraud, which is not suggested in the present case. At any rate the defendant is entitled to a new trial because the county court judge left the case to the jury on the basis that there was an absolute duty on the part of the defendant to give notice to the plaintiff of the issue of the summons in the police court, which was, it is contended, a misdirection. [He cited *Union Credit Bank* v. *Mersey Docks and Harbour Board.* (1)]

*Warren*, for the plaintiff in reply, was stopped.

VAUGHAN WILLIAMS L.J. In this case the plaintiff brought an action in the county court, claiming a return of certain household furniture belonging to her, or, alternatively, damages for wrongful conversion of the same. In that action the defendant did not dispute the fact that the furniture in question had been deposited by the plaintiff, as her property, with him, as a warehouseman, for reward to him in that behalf. It was also not denied that there had been a demand by the plaintiff for the return of the goods, and that that demand had not been complied with by the defendant. The defendant relied by way of defence, with regard to the bulk of the goods, on the fact that they were the subject-matter of an order, which had been made by a magistrate at the West London Police Court, under the authority conferred upon him by s. 40 of the Metropolitan Police Courts Act, 1839. That section has no particular reference to goods deposited in a warehouse to be taken care of by the warehouseman. It is merely a section which gives power to a metropolitan police magistrate to order delivery of goods, up to the value of 15*l.*, which are unlawfully detained, to their owner. What happened here was as follows. The goods in question, which belonged to the plaintiff, who was a married woman living apart from her husband, having, as I have said, been

(1) [1899] 2 Q. B. 205.

deposited by her with the defendant, her husband, who had no right whatever to the goods, went to the defendant's warehouse, and made an application for delivery of the goods to him, asserting that they were his, and not his wife's. The defendant, through his manager, said that the goods had been deposited with him by the plaintiff, and he could not give them up to the husband, unless protected by a magistrate's order. Thereupon the defendant's manager instructed the defendant's assistant manager, Cameron, to go off with the husband to the police court, and it seems really to have been arranged that the husband should apply to the magistrate for an order for delivery up to him of the goods by the defendant. Accordingly the husband applied for and obtained a summons, which was addressed to and served on the defendant, calling upon him to shew cause why he should not be ordered to deliver up the goods to the husband. Some days elapsed before the hearing of that summons, and it clearly appears from the evidence that, before the hearing, the defendant by his manager was aware of the address of the plaintiff, who had deposited the goods. As a matter of fact, it is also clear that, before the summons came on for hearing, no communication of any sort was made by the defendant or his servants to the plaintiff of the fact that this claim to the goods was being made by the husband. I need not go into the evidence in detail, but the letter which was written on behalf of the defendant to the plaintiff on April 14, after the magistrate's order had been made, shews plainly that the defendant was not prevented from giving notice of the husband's claim to the plaintiff before the hearing by reason of not knowing her address. He knew it sufficiently well, as is shewn by that letter, to give notice to her almost immediately after the order had been made which was intended to defeat her title to the goods. As I have already said, the defence which is set up is the order of the magistrate. Without reading s. 40 at length, I may say that it is a section which enables the magistrate to order delivery of possession of goods alleged to be unlawfully detained to the person taking out the summons, and imposes penalties for non-compliance with such an order, but the order does not debar any person from recovering possession of the goods by action,

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provided the action is commenced within six calendar months from the date of the order. The case has been argued on both sides on the assumption that the plaintiff cannot succeed, unless she satisfies the Court that any right of action by her against the defendant in respect of the goods has not under the circumstances been interfered with or barred by the order made under the section. The question, therefore, which we have to consider is whether the plaintiff's action is maintainable notwithstanding the order made by the police magistrate.

Before dealing with the effect of the order, I think it is desirable to consider what was the duty of the defendant, as bailee of the goods in question. The action here is not merely for negligence; it is an action either for detinue or conversion of the goods, and, before dealing with the question whether it will lie under the circumstances, it is I think important in the first instance to ascertain what the duty of the bailee is towards his bailor, while the goods are in his possession under a bailment such as was made in the present case by the bailor, and accepted by the bailee for reward to himself. I think that, upon a hostile claim being made to the goods, it was undoubtedly prima facie the duty of the bailee to take reasonable steps to protect the title of the person who had deposited the goods with him under such circumstances as existed in this case. Without going into details, I can only say that in my opinion it is perfectly clear that the defendant in this case did not take such steps to communicate to the plaintiff that an adverse claim was being made to the goods as a reasonable man ought to have taken. In the Divisional Court Phillimore J. said: "I do not find that there was any duty on the part of the defendant to do more than bring to the notice of the tribunal before which the matter came that there was a claimant other than the husband to these goods. That was effectually done by the defendant, but, unfortunately, the magistrate allowed himself to be deceived by the false statements which were made by the plaintiff's husband. So far, however, as the warehouseman or bailee was concerned I do not think that he was under any duty to do more than he did." With all respect to the learned judge,

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I cannot agree with him that the only duty of the bailee was to make the statement which he made to the magistrate when the case came on for hearing. I think that, there being a rival claim to the goods, he had under the circumstances a plain duty to communicate to the bailor the fact that this claim was being made to the goods, the custody of which had for reward been accepted by him. That being so, in my judgment, upon the assumption that there was such a duty as I have stated, the judgment of the county court judge can be supported on the ground of breach of that duty. Although I am of that opinion, I wish to deal with another ground upon which I think his judgment can be supported. The defence set up here is that the defendant acted under the compulsion of the magistrate's order. I agree that the order prima facie justifies a defence of "I was dispossessed by power paramount, i.e. the order of the magistrate which determined the bailment"; but I am not satisfied that the defendant did act under the compulsion of that order. It seems to me that it would be impossible to say that, when the summons had been taken out and served upon him, the defendant could have stayed away from the hearing, or sent some clerk or servant who knew nothing about the matter to attend the hearing. I think that he was under an obligation, as bailee of the goods, to appear, and make a statement to the magistrate as to the circumstances; and I think that this was hardly denied by the defendant's counsel. In my judgment there is good ground for saying that, if the defendant had given notice of the claim to the plaintiff, and she had attended at the hearing, the order which was made by the magistrate never would have been made. I think that it was his duty to give her notice, and it was not sufficient for the defendant to tell the magistrate that there was a claimant to the goods other than the person who had taken out the summons. The matter does not stop there, because in my judgment the bailee cannot rely on the magistrate's order as protecting him, unless he really acted under compulsion of the order. I have already stated that in this case I think the summons was really taken out by the husband by arrangement with the defendant's manager. I wish to say that I do not impute to the defendant or his servants in this case any collusion

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or fraud of any sort or kind, but I think that the defendant was being pressed to give up the goods, and he was naturally desirous of getting protection, if he had to give them up to the husband; so really his servant goes up to the police court with the husband and they get this summons taken out, and, having done that, the defendant seems to have thought that he had done his duty so far as the plaintiff was concerned by merely mentioning to the magistrate the fact that there was another claimant to the goods, namely, the plaintiff. Again, when the order was made, there was no obligation on the defendant under it to give up the goods, unless and until he was paid the charges due to him for warehousing the goods. The defendant's servant demanded payment of those charges, and the husband said that he could not pay them, not having any money; and, thereupon, the warehouseman could have said, if he had chosen, that he would not give up the goods until they were paid. He did not do that, but acceded to the suggestion of the husband that he should buy some of the goods from the husband, and that the price of those goods should be set off against the warehousing charges. I doubt whether the defendant can say that he acted under compulsion of the order, because here again I think he acted by arrangement with the husband. The mere fact of such an order having been made does not seem to me to be sufficient to protect the defendant, unless he really acted under compulsion of the order. When this case came on to be heard, the defendant no longer sought to justify what he had done with regard to the purchase of those particular goods, and treated them as a portion of the goods deposited with him by the plaintiff still remaining in his hands, but that was not until after the action in the county court was brought. I think myself that the defendant cannot really take advantage of this order on the basis that he acted under compulsion of it. I think that, in truth and in fact, in the present case what happened was really the result of an arrangement made in order that, when the goods were given up by the defendant, he should have the protection of a magistrate's order. I have very little more to say except that I wish to call attention to a case which I think throws a little light on the question in this case, although it is

not a case of the same kind, namely, *Wood* v. *Dunn*. (1) There the plaintiffs, as trustees under a deed of arrangement for the benefit of creditors of S. under the Bankruptcy Act, 1861, sued for a debt due from the defendant to S., and the defendant pleaded that a judgment creditor of S. had obtained a garnishee order attaching the debt, and that he had been ordered to pay, and had accordingly paid it, to the judgment creditor. The plaintiffs replied that the trust deed was registered under the Bankruptcy Act, 1861, before payment of the debt by the defendant to the judgment creditor. The Court of Queen's Bench gave judgment for the plaintiffs on the ground that the payment being after registration of the deed was not protected, though made under the garnishee order. That judgment was not approved by the Exchequer Chamber, and was set aside. As far therefore as the result of the case is concerned, it is a case in which the garnishee order under which payment had been made was held a sufficient protection to the defendant, but, although that is so, when one comes to read the judgment in the Exchequer Chamber, there is a good deal in it to shew that the protection of such an order could really only be relied upon where the debt had in truth been paid under compulsion of it. It is not worth while to read the marginal note at length, but the second semble therein is as follows: "Semble also that, if the garnishee has notice of a trust deed or bankruptcy before the time for shewing cause against the ex parte order has elapsed, he would be bound to shew cause, and, if he were to pay to the judgment creditor, instead of shewing cause, the assignees could recover the debt from him." That case is of course very different from the present, but what was said seems to me to shew that under some circumstances a person who is affected by an order may be under an obligation to shew cause against the order, and I wish to point out that here the defendant not only did not give notice to the plaintiff of the claim being made against her goods, but, when the case was before the police magistrate, though the defendant stated that there was another claimant of the goods, he in no way seems to have put the case of the bailor properly before the magistrate. He

(1) L. R. 2 Q. B. 73.

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shewed no cause whatever why the order should not be made. I think that under the circumstances he is estopped by his own conduct from relying upon the magistrate's order. The conclusion at which I have arrived is that, if, instead of only appearing, as he did, when the order was made of which he claims the protection, he had really either himself shewn cause, i.e., put forward the case of his bailor, or by giving her notice of the claim enabled her to come and shew cause herself, the order made by the magistrate would never have been made. I think that this order was the result of a proceeding arranged for the defendant's protection, and therefore that he cannot rely upon it. I need not say anything about the particular parcels of the goods which were purchased by the defendant as I have described. They have been disposed of during the argument. In my opinion this appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. Sect. 40 of the Metropolitan Police Courts Act, 1839, is obviously intended to deal with cases where goods of small value are unlawfully detained by some person, and it is desirable, by reason either of the value of the goods being small, or of the position of the parties concerned, that there should be a summary remedy in a police court by which the illegal possession of the goods may be brought to an end. The object of the section is merely to effect a change in the possession of the goods, where the magistrate is satisfied that they are illegally detained. There was in the present case a bailment by the plaintiff, who was a married woman living apart from her husband, to the defendant, who was a warehouseman, of furniture belonging to her, the value of which must, I think, be taken to have been somewhere about 50*l*., to be taken care of for reward to the defendant. The date of this bailment was March 30, 1910. When the bailment was made, the defendant's carman, who went to fetch the goods, was told the future address of the plaintiff, and that address was communicated by him to the defendant, and entered in his books. On April 8, a man, previously unknown to the defendant, came to the defendant's premises, and, asserting that he was the bailor's husband, claimed to be entitled to the furniture in question, and demanded

delivery of it. The defendant's manager told him that it had been placed in the defendant's hands by the plaintiff, and gave him her address. He went away, but came again the next day, and said that he had been to the address given to him, and could not hear anything of his wife there, and again demanded the goods. Then it seems to have been suggested by the defendant's manager that the defendant's assistant manager should go with the husband to the police court in order that the husband might get an order by the magistrate for delivery of the goods to him, so that the defendant might be protected in giving them up to him. It is the duty of a bailee to take care of the goods bailed to him, and, if a hostile claim is made to them, to see that the bailor's property is properly defended, or at any rate to give notice to him, if possible, of proceedings hostile to his title. In the present case the bailee allowed the bailor to remain in ignorance of the fact that a hostile claim had been made, and the servant of the bailee went with the hostile claimant to the police court, when application was made for an order, to assist him in the proceeding. A summons was obtained and served on the defendant, and he kept it for four days in his hands without endeavouring to inform the plaintiff of the existence of the proceedings. When the summons came on for hearing, the servant of the defendant and the husband again went together to the police court; the claimant alone went into the witness-box and swore that the furniture was his; and, so far as I can make out, the defendant's servant did not even inform the magistrate of the circumstances of the bailment. At any rate, during the four days which intervened between the service of the summons and the hearing, he had not, as I have said, given notice of the proceedings to the bailor. An order was consequently made for delivery of the furniture to the husband upon payment of the warehousing charges. The husband told the defendant's servant that he had no money to pay those charges, whereupon an arrangement was made, by which the defendant's servant on the defendant's behalf bought some of the furniture from the husband, set off the price against the charges, and delivered the remainder of the goods to the husband. The next morning, after the property

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of the plaintiff had been thus disposed of behind her back, the defendant wrote a letter to the plaintiff, whose address he had known throughout, informing her that the goods deposited by her had been removed by order of the police court, with the exception of those not claimed by the husband. Under these circumstances the defendant has the courage to defend the action brought against him by the plaintiff for the wrongful detention or conversion of the goods. It is clear from the way in which the case was conducted in the county court that the action was treated as also involving a claim for failure by the defendant to perform his obligations as a bailee. In my opinion, it was clearly a failure to perform his duty as a bailee that, when there had been a summons taken out for the purpose of obtaining an order for delivery of the goods bailed to a hostile claimant, (which summons was in his hands for four days,) the defendant should not have given notice of it to the bailor, which he might have done by means of a halfpenny post-card ; and a magistrate's order obtained through such a neglect of his duty by the bailee cannot avail him as a defence to the plaintiff's claim. In my opinion the action in the county court was an undefended action.

In saying this, I do not wish to be understood as making any charge of collusion, in the proper sense of the term, against the defendant or his servants, but I adopt the words of Vaughan Williams L.J. to the effect that the obtaining of this order was arranged for the purpose of protecting the bailee, and that the circumstances under which it was obtained are quite sufficient to estop the defendant from setting it up as a defence. That being so, it is not necessary for me to go into the details of the claim. But it is necessary to point out that, as to the goods still in the hands of the defendant, which were purchased by the defendant's servant from the husband under the arrangement which I have mentioned, the magistrate's order is immaterial. Its operation is to change possession but not property, so that these goods always remained the goods of the plaintiff and as to them there could be no defence.

FARWELL L.J. I am of the same opinion. The action in the county court seems to have been treated as one for negligence on

the part of the bailee in not taking reasonable care of the goods bailed to him. The jury found that there was such negligence on the part of the defendant, and the appeal, in substance, is on the ground that there was no evidence of such negligence. In the county court the defendant relied by way of defence on the magistrate's order under s. 40 of the Metropolitan Police Courts Act, 1839, for delivery of the goods to the plaintiff's husband. In my opinion that order does not avail him. An order of a Court of competent jurisdiction made within its jurisdiction is no doubt binding on all parties properly brought before the Court at the time of the making of the order. The first point raised by the evidence in this case, but not taken in terms before the county court, is that there was no jurisdiction to make the order in this case, because it is clear that the goods in question were of greater value than 15*l*. I pass that by, however, and come to the second point, which is one of great importance. The order of a Court only binds persons who are properly brought before it. I had occasion to consider this point when giving judgment in *Brydges* v. *Brydges*.(1) I there said: "The Court has no jurisdiction, inherent or otherwise, over any person other than those properly brought before it as parties, or as persons treated as if they were parties under statutory jurisdiction (e.g. persons served with notice of an administration decree, or in the same interest with a defendant appointed to represent them) or persons coming in and submitting to the jurisdiction of their own free will, to the extent to which they so submit, (e.g. creditors of a bankrupt executor, who has carried on business under a power in the will, coming in to claim against the testator's estate in order to obtain subrogation to the executor's right of indemnity). But the Courts have no jurisdiction to make orders against persons not so before them, merely because an order made, or to be made, may or will be ineffectual without it. Even in the case of an injunction Lord Eldon says in *Iveson* v. *Harris*(2): 'I have no conception, that it is competent to this Court to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause. The old practice was that he must be brought into

(1) [1909] P. 187, at p. 191. (2) (1802) 7 Ves. 251, at p. 256.

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Court, so as according to the ancient laws and usages of the country to be made a subject of the writ.'" Here the magistrate made an order, which had no immediate effect on the property in the furniture, but merely affected the possession of the goods deposited by the bailor with the bailee. That order directed the bailee to deliver up the possession of the goods to the person claiming them, and was made in the absence of the bailor. I think that the bailor was not bound by that order, and the bailee, who knew of that objection to it, cannot under the circumstances rely upon an order so obtained behind the back of his bailor. Another way of putting the case is that the bailee was guilty of negligence. He knew through his servants the address of the bailor, as is shewn by the fact that he wrote the letter to which reference has been made after the goods had been delivered to the husband under the order, but he took no steps to inform the bailor of the summons having been taken out, nor does he seem to have made any effort to prevent the magistrate from making the order in the absence of the bailor. He had a duty to take all reasonable steps to protect his bailor's right to the goods. He did not in my opinion perform that duty, as Phillimore J. held that he did, by bringing to the notice of the magistrate that there was a claimant other than the husband to the goods; he ought to have endeavoured to protect the goods from an order being made in the absence of the bailor. If he had put the matter properly before the magistrate, I feel sure that the magistrate would not have made the order which he did. The observations made in *Wood* v. *Dunn* (1), which have been referred to, are very relevant, and I will cite a passage from the judgment on p. 84 of the report in the *Law Reports*, though only a dictum: "We think it is not necessary for us to decide that it would be safe for a garnishee, having been served with an order to pay, and afterwards, and before payment, receiving notice of a bankruptcy or a trust deed, after that to pay under the order, without an immediate threat of execution, and without taking any steps himself to get the order set aside, or giving notice to the assignee informing him that he should pay unless the assignee got the order set aside." This case is really

(1) L. R. 2 Q. B. 73.

an a fortiori case, because a garnishee owes no original duty by contract to the assignee in bankruptcy such as a bailee owes to his bailor. In my opinion the judgment of the county court judge was quite right, and this appeal should be allowed.

*Appeal allowed.*

Solicitors for plaintiff: *Oswald Hanson & Smith.*
Solicitor for defendant: *L. W. Taylor.*

E. L.

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## *In re* CROPLEY.

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*Bankruptcy — Practice — County Court Bailiff — Warrant of Arrest — "Travelling to execute Warrant" — Mileage — Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 25—*Scale of Fees and Percentages under Bankruptcy Acts,* 1883 *and* 1890, *Table C.*

A warrant for the arrest of a person issued under the Bankruptcy Acts, 1883 and 1890, is not completely executed until the person is lodged in the prison named in the warrant.

Therefore the high bailiff of a county court when travelling to execute such a warrant is entitled to the mileage prescribed in Table C of the Scale of Fees and Percentages under the Bankruptcy Acts, 1883 and 1890, not only from the county court to the place of arrest, but also from that place to the prison where he lodges the person arrested in conformity with the terms of the warrant.

This was an application to reverse the decision of the taxing Master in bankruptcy in these circumstances.

The debtor failed to surrender to the bankruptcy proceedings against him in the Croydon County Court, and in March last a warrant for his arrest was issued by that Court under s. 25 of the Bankruptcy Act, 1883. The warrant followed Form 164 in Part I. of the Appendix to the Bankruptcy Rules, 1883 and 1890, and required the high bailiff to take the debtor and to deliver him to the governor or keeper of Brixton Prison and directed the governor or keeper of the prison to receive the debtor and to keep him in safe custody. Acting under the warrant the high bailiff's man travelled from the Croydon County Court to Loddon, in Norfolk (a distance of 110 miles), where he arrested the debtor

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and took him from Loddon to Brixton Prison and delivered him to the governor or keeper of the prison. The high bailiff, who was also the registrar of the county court, to avoid the difficulty of taxing his own bill of costs in executing the warrant, referred the taxation to the registrar of the Guildford County Court, who taxed the bill under Table C of the Scale of Fees and Percentages under the Bankruptcy Acts, 1883 and 1890 (1), and allowed the high bailiff's mileage at 5*d.* per mile from Croydon to Loddon and from Loddon to Brixton Prison. The Board of Trade, acting under r. 124 of the Bankruptcy Rules, 1883 and 1890, required this taxation to be reviewed by the bankruptcy taxing Master of the High Court, who taxed off the mileage from Loddon to Brixton Prison on the ground that the high bailiff was only entitled to mileage from Croydon to the place of arrest, Loddon.

The bankruptcy taxing Master's reasons for his decision were as follows:—

"I am of opinion that the fee of 5*d.* per mile under Table C (of the Scale of Fees, Bankruptcy Acts, 1883 and 1890) for high bailiff's man travelling to execute the warrant of arrest in this case ought to have been limited to the outward journey Croydon to Loddon. I am not aware of any decision on the point, nor are there any specific words in the table which limit the mileage in this way, but my opinion is based on the following grounds:—

"(1.) The fee for the bankruptcy officer's man of the Supreme Court has invariably been charged and allowed at 5*d.* per mile one way, and no attempt has ever been made (to my knowledge) to get it extended.

"(2.) Considering that the third class railway fare is seldom more than 1*d.* per mile (sometimes less), the allowance of 5*d.* per mile for travelling as provided in the table was, in my opinion, intended by the Legislature to cover the double journey.

(1) "TABLE C.

| | *s.* | *d.* |
|---|---|---|
| "High Bailiff's, (or in the London district) officer's man, travelling . . . . to execute a warrant of or order of commitment—per mile | 0 | 5 |
| "His time, per day, where distance exceeds 10 miles . . . | 4 | 6 |
| "His expenses, per day . . . . . | 4 | 6" |

"(3.) That taken in conjunction with the next two items in this Table C, namely:—

| | s. | d. |
|---|---|---|
| His time per day . . . . | 4 | 6 |
| His expenses per day . . . | 4 | 6 |

it is obvious that this fee of 5*d.* per mile is meant to cover the expenses of travelling only, and, for the reason given in (2.), mileage for the outward journey only is ample allowance.

"(4) In all analogous cases of solicitor's charges the allowance for mileage in serving writs and other documents requiring personal service is only for the single journey after the first two miles.

"I observe that the registrar seems to base his allowance on the assumption that the warrant was not executed until the debtor was actually lodged in prison. My view is that the words in the table 'travelling to execute a warrant' might equally well mean 'travelling to the most distant point to which the officer has to go for the purpose of executing the warrant by arresting the debtor.'"

The high bailiff now moved to reverse the decision of the bankruptcy taxing Master.

The *High Bailiff* in person. High bailiffs are now appointed under, and their duties are prescribed by, ss. 33—36 of the County Courts Act, 1888. Their salary was prescribed by a Treasury minute of April 12, 1870, and by s. 46 of the Act of 1888 their remuneration may be paid partly by salary and partly by allowances for the execution of warrants and for mileage on the service or execution of any process, and Table C provides that their mileage for travelling to execute a warrant shall be 5*d.* per mile. The mileage, therefore, is part of the remuneration of a high bailiff, who is a public officer, and the taxing Master has no power to deprive him of any part of it. Then r. 84 of the Bankruptcy Rules, 1883 and 1890, provides that where a debtor is arrested under a warrant issued under s. 25 of the Act he shall be given into the custody of the governor or keeper of the prison mentioned in the warrant, and Form 164 in Part I. of the Appendix to the Bankruptcy Rules gives the form of the warrant. The bailiff's man starts from the county court where the warrant is

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issued, and it is submitted that the warrant is not "executed" until he has delivered the person arrested to the governor or keeper of the prison mentioned in the warrant. In some cases he may arrest the person in or within a mile or two of Croydon and take him on to Brixton Prison, which is about six miles from Croydon. In other cases he may have to go a long distance to arrest the man and bring him back to Brixton Prison. In either case he is travelling all "one way" in execution of the warrant, and it is all his journey "out" until he lodges his prisoner at the prison, although he may come nearly all the way home in bringing his prisoner back to Brixton. It has been the invariable practice in the county court for the past fifty years to allow the mileage on this footing.

*Hansell,* for the Board of Trade. There is no authority on the point. The taxing officer thought that the analogy of the mileage allowed to solicitors for serving writs, &c., by paragraph 29 of Appendix N to the Rules of the Supreme Court applied: Annual Practice (1911), vol. 2, p. 208.

[PHILLIMORE J. I do not think so. The solicitor's journey is completed when he serves the document, but the bailiff's man does not complete his job until he lodges his prisoner in the prison.]

The nearest analogy is the mileage "one way" allowed to the registrar of a county court who is required to attend elsewhere: County Courts Act, 1888, Order as to Fees, 1903, Part I., Sched. B, paragraph 17. He gets nothing for his return journey. In Table C no distinction whatever is drawn between the high bailiff's man and the officer's man in the High Court, and it is clear that for executing a warrant they get nothing except their outward journey charges. They get no allowance for their journey home. Executing a warrant means "taking in execution." The bailiff's man has executed the warrant when he has arrested the man named in the warrant, although he may be liable if he allows his prisoner to escape before he is lodged in prison. Since the Bankruptcy Act, 1861, it has been the invariable practice in the High Court not to allow mileage beyond the place of arrest, and it is submitted that the practice in the High Court should not be altered.

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PHILLIMORE J. I think Mr. Fox is right in his contention, but it may be that the taxing Master was misled to some extent by the manner in which the claim for the outward journey was made before him. Under scale C the high bailiff is entitled to his mileage for travelling to execute a warrant, but he is not entitled to charge for his journey home. The warrant directs the high bailiff to arrest the debtor and to deliver him to the governor or keeper of Brixton Prison, and requires the governor or keeper of the prison to receive the debtor and to keep him in safe custody, and in my judgment the warrant was not completely executed until the high bailiff had lodged the debtor at Brixton Prison. The high bailiff therefore was entitled to his mileage for the whole of the distance he travelled for the purpose of executing the warrant, that is to say, he was entitled to charge for travelling from Croydon to Loddon, where he arrested the debtor, and for bringing the debtor with him from Loddon to Brixton Prison. He was entitled to mileage for his "journey out," and to my mind the journey out is the journey necessary for executing the warrant. Now the warrant for the arrest of a person in these cases is not executed, either in law or according to the terms of the warrant, simply by laying hands on the man named in the warrant. It is not executed until the man is lodged in the prison to which the warrant directs that he shall be taken, and the journey to the place where the man is arrested and from there to the prison is all a "journey out." It is all "one way." The fact that a part of the journey from the place of arrest to the place of prison may be a journey homewards is an accident, a lucky accident for the high bailiff here, who is only to be paid according to the mileage scale provided. In some cases, as if the debtor lived within a mile or two of the Croydon County Court, Brixton Prison being about six miles from there, the bailiff would be going further and further away from his place of origin when he was taking the debtor to the prison, and he would have to travel the whole of the way back at his own expense. In this particular case, as the debtor lived a very great distance off on the further side of Brixton Prison, it happens that the bailiff's mileage from Croydon to Loddon and from Loddon to Brixton Prison has very nearly covered all his

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journey home; but that is a mere accident. I do not think that under the words of the scale there is the slightest difficulty in construing it as meaning that the bailiff's man is not to have his mileage until he has lodged the man in prison, and until the man is lodged in prison it is all a "journey out." Anything claimed beyond that must be disallowed.

I would add that, if it be the practice in the London Courts to allow the mileage to the place of arrest and not to allow it from the place of arrest to the place of prison, the sooner the thing is put right by some rule or order the better. There should be a uniform practice in these matters.

Solicitor to the Board of Trade: *R. Ellis Cunliffe.*

H. L. F.

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*Dec.* 15, 16.

## ARNOLD *v.* MORGAN.

*Justice of the Peace—Ouster of Jurisdiction—Bona fide Claim of Right—Right possible in Law—Public Highway along Railway—Dedication by Railway Company—Trespass—Great Western Railway (No. 1) Act*, 1882 (45 *&* 46 *Vict. c. ccxiv.*), *s.* 38—*Regulation of Railways Act*, 1868 (31 *&* 32 *Vict. c.* 119), *s.* 23.

In answer to an information charging the defendant before two justices of the peace under s. 38 of the Great Western Railway (No. 1) Act, 1882, with trespassing on a railway in such manner as to expose himself to danger, the defendant alleged that he was lawfully upon the railway in exercise of a right which he claimed as one of the public to pass and repass along the railway as upon a highway dedicated before the passing of the Regulation of Railways Act, 1868, by the railway company or by another railway company with which it had been amalgamated:—

*Held*, that the jurisdiction of the justices was ousted, for that a railway company, like any other statutory body, may dedicate a highway over land vested in it by statute, provided that the dedication is not incompatible with the objects prescribed by the statute.

*Rex* v. *Leake*, (1833) 5 B. & Ad. 469, and *Grand Junction Canal Co.* v. *Petty*, (1888) 21 Q. B. D. 273, followed.

*Held*, also, following *Cole* v. *Miles*, (1888) 57 L. J. (M.C.) 132; 60 L. T. 145, that the question whether such a dedication is compatible with those objects is not a question to be tried by justices in petty sessions.

*Held*, also, following *Cole* v. *Miles*, supra, that the question, whether a

highway dedicated by a railway company before the passing of the Regulation of Railways Act, 1868, had been extinguished by s. 23 of that Act, was not a question for the justices; and that, if it were, it ought to be answered in the negative.

CASE stated by justices of the peace for the county of Carmarthen.

An information was preferred by the appellant against the respondent under s. 38 of the Great Western Railway (No. 1) Act, 1882 (45 & 46 Vict. c. ccxiv.) (1), for unlawfully trespassing upon a certain railway of the Great Western Railway Company in such manner as to expose himself to danger. The respondent alleged that he was lawfully upon the railway in exercise of a right which he claimed as one of the public to pass and repass along the railway as upon a highway dedicated to the public by the railway company or its predecessor, another railway company, with which it had been amalgamated.

(1) By s. 38 of the Great Western Railway (No. 1) Act, 1882 (45 & 46 Vict. c. ccxiv.), it is enacted that any person who shall trespass upon any of the railways or stations of the company in such manner as to expose himself to danger or risk of danger shall without having received any personal or other warning than thereinafter mentioned forfeit and pay by way of penalty any sum not exceeding forty shillings for every such offence, and the provisions of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for and of penalties and to the determination of any other matters referred to justices shall apply to this enactment, provided that no person shall be subject to any penalty under this enactment unless the company shall prove to the satisfaction of the justices before whom complaint is laid that they have painted on boards or printed on paper and pasted on boards public warning to persons not to trespass upon their railway, and that one or more of such boards has been affixed at the station on their railway and at the level crossing (if any) nearest to the spot where such trespass is alleged to have been committed, &c.

By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 145, every penalty imposed by that Act or the special Act, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices.

By the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 23, if any person shall be or pass upon any railway, except for the purpose of crossing the same at any authorized crossing, after having received warning by the company which works such railway, or by any of their agents or servants, not to go or pass thereon, every person so offending shall forfeit and pay any sum not exceeding forty shillings for every such offence.

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On the hearing of the information the following facts were proved:—The railway where the alleged trespass took place was the Dafen branch of the Great Western Railway, a branch of about two miles in length running from Dafen to the docks at Llanelly. Within about half a mile of its dock terminus it crosses on the level the South Wales main line of the Great Western Railway Company.

This branch railway is used for the conveyance of goods traffic only, but in the immediate neighbourhood of the main line it is extensively used for shunting and other purposes. It was formerly a horse tramway. The undertaking was originally created under a statute of 1828, 9 Geo. 4, c. xci., whereby powers were granted to the Llanelly Railway and Dock Company to construct a railway or tramroad from Gelly-Gille farm in the parish of Llanelly to Machynis Pool (now Llanelly Docks) in the same parish for the conveyance of mineral and other produce. The quantity of traffic conveyed along the tramway was very small. Until about the year 1852 it was conveyed in waggons drawn by horses. By a statute of 1889 (52 & 53 Vict. c. xxxiii.) the undertaking was amalgamated with the Great Western Railway.

The respondent was on the branch railway on the date alleged without any right other than the right of way claimed by him.

Notices warning persons not to trespass had been duly placed and renewed at the station and at the level crossing as required by s. 38 of the Great Western Railway (No. 1) Act, 1882.

The public have used the branch railway in its whole length by walking thereon for the past sixty-four years without cessation. The number of persons using it daily was at least 200.

The branch railway was extensively used by the public at the time when the South Wales main line of the company was made in 1852. One witness, whose evidence the justices accepted, said that when the main line was marked out the Dafen branch was "free like a turnpike road.

During recent years attempts had been made by officials of the Great Western Railway Company to stop the user by the public of the Dafen branch, particularly in the neighbourhood of the main line. The user had, notwithstanding, continued practically unabated until the date of the alleged trespass.

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On the part of the appellant it was contended that the right claimed was impossible in law, on the ground that a right of way could not be acquired by the public on land belonging to a railway company.

On the part of the respondent it was contended that a bona fide claim to a right of way had been set up, and that the jurisdiction of the justices was ousted; it was not contended on his behalf that the right was in existence before 1828.

The justices came to the conclusion upon the evidence, in the first place, that the claim set up by the respondent was a bona fide and an honest claim, and, in the second place, that it was not impossible in law. Upon the authority of the cases of *Rex* v. *Leake* (1) and *Grand Junction Canal Co.* v. *Petty* (2) it appeared to them that it is possible for a statutory corporation to dedicate, and for the public to acquire, a right of way, provided it is not inconsistent with the purposes for which the land was acquired. The judgment of the Queen's Bench Division in *Scott* v. *Baring* (3) appeared to make it unnecessary for them, if the claim was not on the face of it impossible, to inquire into all the circumstances to see if it was impossible. In the present case, however, in their opinion it was quite possible for the public to have acquired a right of way upon the Dafen branch. It was not inconsistent with the purposes for which the land was acquired in the year 1828, because for many years after that date the statutory user of the land consisted of the haulage over it by horses of a small quantity of traffic. The evidence given before them proved to their satisfaction that the public by the year 1853 were using it like a highway.

The justices also found that to decide the issues raised would necessitate a careful investigation of sixteen statutes relating to the branch railway in question and the taking of evidence which would amount to an inquiry into a question of title and was therefore outside their jurisdiction. Being, therefore, of opinion that the claim of right was bona fide set up by the respondent, and that the right was possible in law, they dismissed the

(1) 5 B. & Ad. 469. (2) 21 Q. B. D. 273.
(3) (1895) 72 L. T. 495.

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information, but, at the request of the appellant, stated this case for the opinion of the High Court.

*Bailhache, K.C.*, and *Schiller*, for the appellant. In order to oust the jurisdiction of the magistrates the right claimed must be one which is possible in law. That is not so here. A railway company holding land for the purposes of its undertaking cannot grant any easement or other right over it except with a view to the traffic of the railway: *Mulliner* v. *Midland Ry. Co.* (1) A right of way in the public along a railway is incompatible with the user of the railway, and therefore the railway company is incapable of dedicating the way: *Grand Junction Canal Co.* v. *Petty* (2); *Great Western Ry. Co.* v. *Solihull Rural District Council.* (3) It is a question of fact in each case whether the grant or dedication by a statutory corporation is or is not compatible with the objects for which the corporation was created: *Attorney-General* v. *London and South-Western Ry. Co.* (4) The justices ought at any rate to have heard evidence on that question and decided whether or not in this case the dedication was or was not compatible with the objects of the railway company. There is only one conclusion at which they could have arrived. Such a right as that claimed would effectually stop the undertaking of the railway.

Secondly, this railway was originally constructed under powers conferred on the Llanelly Railway and Dock Company by an Act of 1828 (9 Geo. 4, c. xci.). Further powers were conferred on the company by an Act of 1835 (5 & 6 Will. 4, c. xcvi.); by s. 24 of that Act a penalty is imposed on any person passing on foot or on horseback on this railway or tramroad without the licence and consent of the company. That section was no doubt repealed by s. 6 of the Llanelly Railway and Dock Act, 1853 (16 & 17 Vict. c. clxix.); but by s. 16 of the Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), any person wilfully trespassing upon any railway and refusing to quit the same upon request by an officer of the company may be detained by the officer and taken before a justice of the peace and fined; and by s. 23 of the

(1) (1879) 11 Ch. D. 611.
(2) 21 Q. B. D. 273.
(3) (1902) 86 L. T. 852.
(4) (1905) 69 J. P. 110.

Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), if any person shall be or pass upon any railway, except for the purpose of crossing the same at any authorized crossing, after having received warning not to go or pass thereon, he is liable to a penalty. In view of these statutes if a right of way was ever dedicated it was extinguished in the year 1868.

*Montague Shearman, K.C.*, and *R. M. Montgomery*, for the respondent. This case is concluded by authority, and the course taken by the justices in dismissing the information was the only course they could legally take. The claim being a bona fide claim, the question in this case is whether the right claimed is one which is possible in law: *Hudson* v. *MacRae* (1); *Watkins* v. *Major*. (2) If it is, the jurisdiction of the magistrates is ousted. There can be no doubt that the right claimed is possible in law. It is well settled that a statutory body, whether its undertaking be a railway, or a canal, or whatever else it may be, may grant an easement or dedicate a highway if the grant or dedication is not incompatible with the objects for which the body was incorporated: *Rex* v. *Leake* (3); *Mulliner* v. *Midland Ry. Co.* (4); *Grand Junction Canal Co.* v. *Petty* (5); *Great Western Ry. Co.* v. *Solihull Rural District Council* (6); *Attorney-General* v. *London and South Western Ry. Co.* (7); *Taff Vale Ry. Co.* v. *Pontypridd Urban District Council* (8); *Lancashire and Yorkshire Ry. Co.* v. *Davenport*. (9) If so, there is an end of this case. No doubt the question whether the grant or dedication is or is not compatible with the objects of the company is a question of fact: *Attorney-General* v. *London and South Western Ry. Co.* (7); but that is just the question which justices in petty sessions are not to try: *Cole* v. *Miles*. (10)

The question whether the highway, having been dedicated, has been extinguished by the Regulation of Railways Act, 1868, is equally beyond their jurisdiction: *Cole* v. *Miles*. (10) That is a question for the High Court when the matter comes properly

(1) (1863) 4 B. & S. 585.
(2) (1875) L. R. 10 C. P. 662.
(3) 5 B. & Ad. 469.
(4) 11 Ch. D. 611.
(5) 21 Q. B. D. 273.
(6) 86 L. T. 852.
(7) 69 J. P. 110.
(8) (1905) 69 J. P. 351.
(9) (1906) 70 J. P. 129.
(10) 57 L. J. (M.C.) 132; 60 L. T. 145.

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before it, and is not a question for a Court of summary jurisdiction. But even if it were, it must be answered adversely to the appellant, because s. 23 of the Regulation of Railways Act, 1868, has not taken away any right acquired by the public; and this highway might have been and was dedicated before the passing of that Act: *Cole* v. *Miles*. (1) Still less did s. 16 of the Railway Regulation Act, 1840, affect the question, which only applies to persons wilfully trespassing on the railway and refusing to quit the same on request. It is quite consistent with that enactment that the public should be freely permitted to use the railway as a highway. But questions such as these are not for justices to decide.

*Schiller* in reply.

RIDLEY J. This is a case stated by magistrates. A summons had been taken out under s. 38 of the Great Western Railway Company's Act of 1882 for trespass upon a branch line of the railway company, known as the Dafen branch, about two miles long, running from Dafen to Llanelly. It crosses the main line of the South Wales portion of the Great Western Railway, but it is only used itself for goods traffic. Down to the year 1852 or thereabouts it was a horse tramway, and was used a great deal by people walking to and fro along it.

At the hearing before the justices the respondent contended that he was lawfully upon the railway in exercise of a public right to pass to and fro along it, and the justices came to the conclusion that the claim to the public right was a bona fide and an honest claim and that their jurisdiction was ousted thereby. Upon that conclusion the present question arises. The appellant contends that the justices ought not to have dismissed the case on that footing; he says that the claim put forward by the respondent is an impossible one, first because it is incompatible with the rights and powers given to a railway company that the public should have a concurrent right to pass to and fro along the railway, and secondly because if any such right ever existed it has been extinguished by s. 23 of the Regulation of Railways

(1) 57 L. J. (M.C.) 132; 60 L. T. 145.

Act, 1868. Neither of these points is really arguable in the present proceeding.

There is no doubt that a corporation can dedicate a way over its property provided that the dedication is not incompatible with the use for which the property has been vested in the corporation. The leading authority for that proposition is *Rex* v. *Leake*. (1) In that case certain commissioners who had been appointed to drain a district made a drain and alongside of it an embankment, on the top of which they allowed the public to pass to and fro. The question was whether the public had acquired a right of passing along the top of this embankment. The following passage is from the judgment of Parke J. (2): "If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power." I need read no further. If the dedication is incompatible with the powers of the statutory body, then as a matter of law the body is incapable of dedicating. Whether the dedication is or is not compatible with the statutory powers is a question of fact, a question which has to be decided before the question of law can be answered. This view of the matter has been supported by subsequent cases. The same principles were laid down in the case of a canal company in *Grand Junction Canal Co.* v. *Petty* (3), where it was held that such a company could dedicate a highway for foot passengers along a towing path. In that case Lord Esher M.R. said (4): "It must be, I think, a dedication to the public of the towing path, for the purpose of such user as a footpath as will not interfere with its ordinary use as a towing path by the company. I do not think that the public walking on the towing path are entitled to say that the towing must be regulated with reference to their convenience. The public in accepting the dedication must be taken to accept it as a limited dedication,

(1) 5 B. & Ad. 469.
(2) 5 B & Ad. at p. 478.
(3) 21 Q. B. D. 273.
(4) 21 Q. B. D. at p. 276.

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and cannot set up a right to prevent or limit the user of the towing path by the company. If the horse or the tow rope and the foot passenger are in one another's way, the foot passenger must look out for himself and get out of the way." The judgments of Lindley and Lopes L.JJ. are to the same effect. Applying this reasoning to the case of a railway in full and general use for passenger trains, goods trains, fast trains and slow, the question of law whether the railway company can dedicate a highway along its line depends on this question of fact, would the dedication be incompatible with the use by the company of the railway as a railway? There may be cases in which there could be but little doubt that the dedication would be incompatible with the user; but there may also be cases of a different sort, where the same considerations of danger do not apply; there are railways in whose user as railways there is nothing incompatible with a public right of passage along them and perhaps also across them. That is one of the points raised in this case. Another point was raised under s. 23 of the Regulation of Railways Act, 1868.

That being so, was the jurisdiction of the magistrates ousted? I think on the authority of *Cole* v. *Miles* (1) that it was, and that their decision was right. The effect of that decision is this: Where a claim of right is set up to do the act complained of, then if upon the consideration of admitted facts it is clear that the law will not admit of the claim raised, the jurisdiction of the magistrates is not ousted; but if, in order to decide whether a legal claim exists, it is necessary to determine some disputed question of fact, or if it is not clear that the right claimed is impossible in law, then the jurisdiction of the magistrates is ousted. In the present case there is a disputed question of fact, whether a right of passage in the public is or is not incompatible with the user of this branch railway, which, as I have said, is not a railway in full use; and so far from its being clear that the right claimed is impossible in view of s. 23 of the Regulation of Railways Act, 1868, it seems clear also from *Cole* v. *Miles* (1) that this enactment did not deprive the public of rights they may have acquired upon the railway. For these reasons I think

(1) 57 L. J. (M.C.) 132; 60 L. T. 145.

the decision of the magistrates was right and this appeal must be dismissed.

PICKFORD J. I am of the same opinion. The respondent claimed as one of the public a right to use a public highway along this railway. It is said that this is an impossible claim because there could not be a public highway over this railway. If the claim was an impossible one in law, then the jurisdiction of the justices is not ousted; but if it is a possible claim in law, then their jurisdiction is ousted, although the claim turns out to be unsustainable and even turns out to be bad on the face of it; for these are not matters for the justices to try. In order to have a dedication two things are necessary, first a person capable of dedicating, and secondly evidence that the person has in fact dedicated. In the present case both those questions appear to be questions of fact. It cannot be said that in no case can a railway and a public highway co-exist; to say that would be to run counter to more than one decided case. I need only mention the judgment of Farwell J. in *Attorney-General* v. *London and South Western Ry. Co.* (1) That was a case of a railway company; it is true that the right claimed was to go across and not, as here, along the whole length of the railway. What the learned judge said was this: "A statutory company can dedicate a footway so long as its user is not inconsistent with the objects and obligations of the company. This being so, the question is really reduced to one of fact." The first question of fact to be decided in the present case is whether the user by the public is or is not compatible with the objects of the railway; the second is whether there was such a user by the public as to lead to the inference of a dedication. Mr. Schiller has argued that the justices must at any rate pursue the investigation of fact so far as to see whether the user was incompatible with the objects of the railway; but that would be to try half the question of title. As I understand the authorities, if, assuming this fact in favour of the claimant, the claim is a possible one in law, then the justices are not to go into the question of fact at all. Therefore in the present case the justices

(1) 69 J. P. 110.

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were not in my view entitled to enter upon the investigation of either of the questions of fact necessary to the decision of this matter, because, assuming all those questions found in favour of the claimant, a dedication would not in law be impossible. No doubt Mr. Schiller has used cogent arguments to shew that the right claimed is in fact incompatible with the user of this railway, in view of its present and future scope and possibilities. But that is not the question which the justices had to decide and not the question which on the present occasion this Court has to decide; and therefore I agree that the justices were right in saying that there was such a bona fide claim of right as ousted their jurisdiction.

HAMILTON J. I agree. The question is whether the justices were right in saying that their jurisdiction was ousted. They found that there was a bona fide claim of right, and the claim clearly involved an elaborate investigation both of fact and of law. The claim was that the Great Western Railway Company or their predecessors in title, the Llanelly Railway and Dock Company, had at some date since 1828 dedicated to the use of the public as a highway the land which was vested in them by various Acts of Parliament for the special purposes of a tramway and railway. If those special purposes were so incompatible with the public use of the land as a highway that the two could not exist together, then no doubt in law the railway company would have been incapable of dedicating the highway. But it cannot be said that the user of a strip of land as a public highway is necessarily incompatible with its user as a railway. The test of incompatibility is not the mere inconvenience of the conjoint user; nor on the other hand is incompatibility in this sense limited to cases where the public user would absolutely prevent the user by the railway company or where the user by the railway company would preclude the public user. The question of incompatibility is therefore a pure question of fact. It was, however, contended that the justices ought to have investigated the facts to ascertain whether in this particular case the inconvenience was so great as to amount to an incompatibility between the user as a railway and the user as a highway which

would prevent the dedication from being legally valid. In my judgment that is an unfounded contention. Such an investigation would be directed to the question whether this statutory body is or is not capable of dedicating a portion of the land vested in it for the purposes of its incorporation. Justices in petty sessions are not the tribunal to investigate complicated questions of fact with a view to deciding such matters as that. On this first point, therefore, the contention that the claim was one which is legally invalid fails.

Then it was said that the right claimed was one which, if it ever existed, had been extinguished by the various statutes referred to. Again, in my view, questions of this gravity and importance are not to be decided by justices. But even if this question could properly be considered by them, I think it ought to be answered adversely to the appellant. I need not examine the Act of George IV. or that of William IV. under which the Llanelly railway was made and regulated, because it was admitted that the material portions of those Acts were repealed by the Llanelly Railway and Dock Act, 1853, and therefore, even if under the earlier Acts that company was incapable of dedicating a highway, from 1853 to 1868 they laboured under no such statutory incapacity. The case of *Cole* v. *Miles* (1), which is a binding authority upon the first point in this case, is also an authority for saying that s. 23 of the Regulation of Railways Act, 1868, does not extinguish any public right of way acquired by reason of a previous dedication. There is no evidence to shew that this highway was dedicated before 1853 or after 1868, and therefore there is nothing in these statutes to prevent the respondent from contending that a dedication has taken place and that the right granted has not been extinguished. On both grounds, therefore, the appellant's contention fails and the justices were right.

*Appeal dismissed.*

Solicitor for appellant: *L. B. Page.*

Solicitors for respondent: *Lloyd George, Roberts & Co., for H. W. Spowart, Llanelly*

(1) 57 L. J. (M.C.) 132; 60 L. T. 145.

W. H. G.

1911
*April* 25.

## WEST YORKSHIRE DARRACQ AGENCY, LIMITED (In Liquidation) *v.* COLERIDGE.

*Contract—Consideration—Agreement by Creditors mutually to forgo Claims—Debtor a Party to Agreement—Claim by one Creditor—Right of Debtor to set up Agreement.*

All the directors of a company in liquidation mutually agreed to forgo their respective claims to directors' fees then owing. The liquidator was a party to the agreement on behalf of the company. Subsequently the company sued one of the directors for work done, and the director counterclaimed against the company for his fees earned previously to the agreement:—

*Held*, that, although there was no consideration for the agreement moving from the company, the fact of the liquidator being a party to it rendered it binding as between the director and the company; and that the agreement was, therefore, a good defence to the counter-claim.

*Slater* v. *Jones*, (1873) L. R. 8 Ex. 186, applied.

Further Consideration of an action tried by Horridge J. with a jury at the Leeds Assizes.

The plaintiff company, in liquidation, claimed for goods sold and delivered and work done. The defendant, who was chairman of the company, denied the claim, and counterclaimed for director's fees for work done and services rendered by him as chairman of the company. By way of defence to the counter-claim the plaintiff company alleged that on October 22, 1907, after the fees had been earned, it was verbally agreed between the liquidator of the company, on behalf of the company, and all the directors of the company, including the defendant, and by the directors mutually one with each and all of the others, that each director, including the defendant, should withdraw and forgo any claim to any unpaid balance of director's fee due to such director; that all the directors except the defendant had withdrawn and forgone their respective claims to fees; and that by reason thereof nothing was due to the defendant in respect of directors' fees.

The jury found for the plaintiff company on the claim, and with regard to the counter-claim they found that at the meeting on October 22, 1907, it was agreed between the liquidator, the defendant, and all the other directors that if the other directors would forgo their fees the defendant would also do so.

*Waugh*, K.C., and *Goodland*, for the plaintiff company. On the finding of the jury the plaintiff company are entitled to judgment on the counter-claim. There was good consideration for the agreement as between each of the directors in their mutual forbearance to enforce their rights to be paid their fees: *Good* v. *Cheesman*. (1) It is not necessary that there should be any consideration moving from the company: *Boyd* v. *Hind* (2); it is sufficient that the company through the liquidator were parties to the agreement. In *Slater* v. *Jones* (3) Kelly C.B. said that "a creditor who is party to such an agreement"—i.e., an agreement by all the crditors to accept a composition—"cannot sue for his original debt in contravention of the rights of the others." That statement of the law is a direct authority in favour of the plaintiff company. [*Foakes* v. *Beer* (4) was also cited.]

*Shortt*, K.C., for the defendant. There was good consideration for the agreement between the directors themselves, but none between the directors and the company, and the mere fact that the company, by the liquidator, was a party to the agreement is not sufficient, in the absence of any consideration moving from the company, to enable the company to set up the agreement as an answer to the counter-claim. "It is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit": *Tweddle* v. *Atkinson*, per Wightman J. (5) In *Good* v. *Cheesman* (1) and *Boyd* v. *Hind* (2) there was some consideration moving from the debtor, because in each case the agreement provided for some act to be done by him. Here, it was not necessary for the company to join in the agreement, and the fact that the company did so cannot give rise to any consideration affecting the company: *Thomas* v. *Shillibeer*. (6) The question in *Slater* v. *Jones* (7) arose under the Bankruptcy Act, and the passage from the judgment of Kelly C.B. relied on by the other side was merely an obiter dictum.

[HORRIDGE J. referred to *Mendelssohn* v. *Ratcliff*. (8)]

(1) (1831) 2 B. & Ad. 328.
(2) (1857) 1 H. & N. 938.
(3) L. R. 8 Ex. 186, at p. 190.
(4) (1884) 9 App. Cas. 605.
(5) (1861) 1 B. & S. 393, at p. 398.
(6) (1836) 1 M. & W. 124.
(7) L. R. 8 Ex. 186.
(8) [1904] A. C. 456.

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HORRIDGE J. The question in this case is whether an agreement between creditors mutually to forgo the debts owing to them is binding upon them in the sense that it can be enforced against them by the debtor who has done nothing more than be a party to the agreement. I should have thought that the question was one which must have been covered by authority, but it appears that there is no case which exactly decides it. The jury have found that there was an agreement made between all the directors of the plaintiff company, one of whom was the defendant, that they should forgo payment of the fees owing to them by the company, and that the liquidator of the company was a party to the agreement. It is contended for the defendant that, though the agreement may be binding as between the defendant and his co-directors, the company are not thereby relieved from liability to pay the defendant his fees. In support of that contention the case of *Tweddle* v. *Atkinson* (1) was cited, reliance being especially placed on the judgment of Wightman J., but it is clear that the plaintiff in that case was in no sense a party to the agreement, and the decision cannot therefore be regarded as one governing the present case. Nor do I think that the cases referred to where there had been a composition between creditors are exactly in point. In *Good* v. *Cheesman* (2) the agreement required that the debtor should himself do something, namely, pay two-thirds of his income to a trustee to be nominated by the creditors, and there was therefore some consideration moving from him, other than his mere act of joining in the agreement as a party to it. In *Boyd* v. *Hind* (3) there was also something to be done by the debtor, for the debtor had to give approved bills in payment of the agreed composition of 10*s.* in the pound. The case which is nearest to the present case is *Slater* v. *Jones*. (4) It is true that that was a decision under the Bankruptcy Act, 1869, but Kelly C.B. in dealing with an agreement for a composition which under the Act was binding on the creditors inter se pointed out that it was also binding as regards the debtor. He said: "Here the creditors have become bound by a resolution that a composition

(1) 1 B. & S. 393.
(2) 2 B. & Ad. 328.
(3) 1 H. & N. 938.
(4) L. R. 8 Ex. 186.

to be paid by instalments, or at a future time, shall be accepted in satisfaction; and I think that a person who is bound by such a resolution is also bound, by necessary implication, not to sue the debtor before the time for payment comes, and until default is made. This construction receives confirmation from many of the cases cited, and especially from those referred to by Bramwell B., and collected in Starkie on Evidence, vol. 2, p. 17, whence it appears that an agreement by all the creditors to accept a composition, though not properly an accord and satisfaction, is really a new agreement for which the consideration to each creditor is the forbearance of all the others. A creditor who is a party to such an agreement cannot sue for his original debt in contravention of the rights of the others." That statement is in no way qualified; the learned judge does not say that it is necessary that there should be some act to be done under the agreement by the debtor, in addition to his being a party to it; and in my opinion it is a statement of the law which is applicable to this case. The liquidator was a party to this agreement, and by becoming a party he obtained the benefit of the consideration which each of the directors gave to his co-director by waiving his right to fees. The agreement is, therefore, binding equally on the directors and on the company through the liquidator; the defendant is, therefore, in my opinion not entitled subsequently to sue the company for the fees which he had agreed to waive.

For these reasons I give judgment for the plaintiff company on the claim and counter-claim.

I only wish to add that no point was taken as to the power of a liquidator, under the Companies (Consolidation) Act, 1908, or otherwise, to bind a company by an agreement of this kind.

*Judgment for plaintiff company on claim and counter-claim.*

Solicitors for plaintiff company: *Simpson, Thomas & Clark, for Simpson, Thomas & Curtis, Leeds.*

Solicitors for defendant: *Wm. Sturges & Co.*

F. O. R.

C. A.
1911
*May* 5.

[IN THE COURT OF APPEAL.]

## HIRACHAND PUNAMCHAND AND OTHERS *v.* TEMPLE.

*Accord and Satisfaction—Sum offered by a Third Party in Satisfaction of a Debt—Effect of Acceptance by Creditor—Extinction of Debt.*

Where the father of a debtor wrote to the creditor, offering an amount less than that of the debt in full settlement of the debt, and enclosing a draft for that amount, and the creditor cashed and retained the proceeds of the draft, and afterwards brought an action against the debtor for the balance of the debt:—

*Held*, that the creditor must be taken to have accepted the amount received by him on the terms upon which it was offered, and, therefore, he could not maintain the action.

*Goddard* v. *O'Brien*, (1882) 9 Q. B. D. 37, questioned.

APPEAL from the judgment of Scrutton J. in an action tried by him without a jury.

The action was upon a promissory note for Rs.1500 for balance of Rs.1303, or its equivalent in sterling, at 1*s.* 4*d.* per rupee, the current rate of exchange, 86*l.* 17*s.* 4*d.*, alleged to be due in respect of principal and interest to the plaintiffs from the defendant, as maker of the note, after giving credit for a sum of Rs.650.

The plaintiffs were money-lenders carrying on business in India, and the promissory note, which was expressed to be "payable at Poona, Bombay, or elsewhere," was given by the defendant in respect of money advanced by them to the defendant, an officer in the army in India. The plaintiffs had also advanced a sum of money to the defendant upon the security of a bond. The plaintiffs, being unable to obtain payment of the amounts due to them from the defendant, applied to the defendant's father, Sir Richard Temple, for payment, and the following correspondence passed. One of the plaintiffs' firm wrote to Sir Richard Temple in England as follows: "Your son, Lieutenant R. D. Temple of the 60th Rifles at Jubbulpore, has intimated to me that I should apply to you for his account. On January 19, 1908, he borrowed Rs.3000 at 2 per cent. per month, and on November 27, 1908,

he borrowed Rs.1500 at 2 per cent. per month." Then followed statement of account shewing balance against the defendant of Rs.3600. On November 4, 1909, Sir Richard Temple's solicitors wrote to the plaintiffs in reply: "Sir Richard Temple has instructed us to communicate with you on the subject of your claim against his son, Lieutenant R. D. Temple, and we are instructed to offer you the sum of Rs.1500 in full settlement. We shall be glad, therefore, if you will arrange with your agents here to hand over the two promissory notes against payment of the above sum." In reply to that letter the plaintiffs wrote on November 19, 1909, as follows: "In reply to your letter of November 4, 1909, we beg to state that we have not got two promissory notes from Lieutenant Temple, the son of Sir Richard. We have received from him one promissory note for Rs.1500, dated November 27, 1908, and one bond for Rs.3000 only dated January 19, 1908. The two accounts are quite separate. We have received from Lieutenant Temple Rs.1000 on account of the bond, and Rs.2000 are still due. We give below a true copy of the bond. Will you please let us know the amount for which Sir Richard is prepared to settle this our claim against his son? We are at a loss to understand on what grounds you offer us Rs.1500. We should like to have separate offers for both accounts." Then followed copy of the bond. On the same date the plaintiffs wrote another letter to Sir Richard Temple's solicitors as follows: "We have received your letter dated November 4, 1909, re Lieutenant Temple, the son of Sir Richard. In reply we beg to state that we have only one promissory note for Rs.1500 from Lieutenant Temple, dated November 27, 1908. We have sent herewith the copy of the promissory note, from a perusal of which you will see that Rs.1860 are due to us. As the account of the bond is quite different from that of the promissory note, we have addressed to you a separate letter regarding the bond. We shall be glad if you will let us know the amount for which Sir Richard is prepared to settle this debt due from his son." Then followed copy of the note. In answer to these letters Sir Richard Temple's solicitors wrote on December 16, 1909, as follows: "We beg to acknowledge receipt of your two letters of 19th

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ultimo. We note you desire us to deal with the two cases separately, and our instructions are to make you the following offers: (*a*) as to the bond for Rs.3000 dated January 19, 1908, Mr. Temple received from you Rs.1250: of this he has paid back Rs.1000, leaving balance of principal due Rs.250 and interest for two years, and our instructions are to repay you Rs.250 balance of principal, and Rs.500 in respect of the two years' interest on the Rs.1250, and we therefore enclose draft by the National Bank of India on the Bank of Bombay, Poona, for Rs.750, and shall be glad to receive the bond. (*b*) As to the promissory note for Rs.1500, dated November 27, 1908, Sir Richard Temple has only now ascertained that his son only received Rs.500 in respect of this, and both he and we were not aware of this when we made you the offer of November 4 of Rs.1500 in respect of both debts, and we mention the matter now to shew why our instructions are not to renew the offer which we made you then. Our instructions are therefore to pay you Rs.500 in respect of principal and Rs.150 in respect of the one year's interest, making together Rs.650. We enclose draft by the National Bank of India on the Bank of Bombay, Poona, in your favour for this amount, and shall be glad to receive the promissory note in exchange." On December 31, 1909, one of the plaintiffs' firm replied: "Received your letter 16th Dec., 1909, also I received a draft for Rs.650 on National Bank, Bombay & Poona, this for promissory note of Nov. 27, 1908, for Rs.1500 passed by Lieutenant R. D. Temple. I am surprised to see how you remit me this much. I want Rs.1500 besides interest. Please refer to my letter Nov. 19, 1909, in which I have sent you a true copy of the promissory note. Please remit me the balance, and then I will return you the promissory note. In the meantime I cash the draft and place the amount in account. I wish you to think over; I have proofs to prove. I see now that Lieutenant R. D. Temple does not remember what he actually received from me. Kindly remit me the balance early." On the same date one of the plaintiff's firm wrote to Sir Richard Temple's solicitors another letter as follows: "Received your letter of Dec. 16, 1909, together with draft on National Bank, Poona & Bombay, for Rs.750. This is in

account towards bond of 19th January, 1908, for Rs.3000. You ask me to return you the bond. How can I return the bond unless I get the full payment? Please refer this to my letter Nov. 19, 1909. Kindly speak to Sir Richard Temple about this account, and please explain him carefully, and tell him that Lieutenant R. D. Temple is a big officer, and of high family, and that he is forgetful. Please also enquire of Lieutenant R. D. Temple whether he has passed a document besides this, and does he remember this, and please remit me the balance due; then I will return you the bond you ask for. Lieutenant R. D. Temple may say anything he likes, I have proofs to prove. I don't see why I should be treated so badly. This is not fair. Therefore I beg you again to refer to the copy of the bond with you. In the meantime I will cash the draft. Kindly remit the balance." The plaintiffs cashed the two drafts mentioned in the above letters and gave credit for Rs.650 in the claim indorsed on the writ.

Scrutton J. held that the facts appearing on the above correspondence constituted no defence to the action against the defendant, and accordingly gave judgment for the plaintiffs for the amount claimed.

*R. V. Bankes*, K.C., and *C. Ashworth James*, for the defendant. The plaintiffs, having retained the sum offered by the father for satisfaction of the debt, must be taken to have accepted it on the terms upon which it was offered. The learned judge in the Court below appears to have been of opinion that, though the conduct of the plaintiffs might be wrong as against the father, and the father might recover from them the money which they had received from him, no defence could upon the facts be set up by the son, because it could not be said that there had been any agreement by the plaintiffs to take the amount of the draft in satisfaction of the debt or any accord and satisfaction of the debt. It is submitted, however, that the authorities shew that, in a case like this, the creditors cannot sue for the balance of the debt, though it may be a little doubtful on the cases on what ground this conclusion rests. In *Welby* v. *Drake* (1), Lord Tenterden seems

(1) (1825) 1 C. & P. 557.

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to put it upon the ground that such an action, being a fraud on the father, is an abuse of the process of the Court. In *Cook* v. *Lister* (1) Willes J. said, "if a debtor pays a portion of the debt, it does not enure as a discharge of the whole, though so agreed, but, if a stranger pays a part of the debt in discharge of the whole, the debt is gone, because it would be a fraud on the stranger to proceed. So, in the case of a composition made with a body of creditors, the assent to receive the composition discharges the debt, because otherwise fraud would be committed against the rest of the creditors. And with respect to the necessity for shewing the assent of the debtor, I apprehend that it is contrary to the well-known principle of law, by which a benefit conferred upon a man is presumed to be accepted by him, until the contrary is proved." It seems, however, clear that, whatever the ground may be, there is under such circumstances a defence to the action. *Day* v. *McLea* (2) was treated by the learned judge as an authority in favour of the plaintiffs, but in that case the cheque was sent by the debtor himself, and it was held on the facts that the cheque was not received by the plaintiffs in satisfaction of the debt. That decision is no authority for a case in which a smaller sum is sent by a third party and received by the creditor in satisfaction of the debt, to which case the doctrine of *Cumber* v. *Wane* (3) is not applicable. [They also cited *Lewis* v. *Jones*. (4)]

*Clayton*, K.C., and *Cecil Walsh*, for the plaintiffs. In substance the defence set up is one of accord and satisfaction. If the father is to be regarded as the agent of the son in the transaction, then the decision in *Day* v. *McLea* (2) applies. If the father is to be regarded as having acted as a third party, and not as the agent of the son, it may possibly be that, if the creditors had agreed to accept a sum smaller than the debt from a third party in satisfaction of the debt, there would have been an accord and satisfaction, and they could not then sue for the balance of the debt. But in the present case the plaintiffs never did agree to accept the smaller sum in satisfaction of the

(1) (1863) 13 C. B. (N.S.) 543, at p. 594.
(2) (1889) 22 Q. B. D. 610.
(3) (1719) 1 Str. 426.
(4) (1825) 4 B. & C. 506.

debt, as is shewn by their letters of December 31. In the cases which have been cited for the defendant, it is clear that the creditors had agreed to take the amount paid in satisfaction of the debt. In the absence of any such agreement the payment of the smaller sum by the father cannot amount to an accord and satisfaction. The fact that the plaintiffs' action in taking the money, and afterwards suing the son, may have been wrong as against the father cannot afford a defence to the son. It is res inter alios acta as between the plaintiffs and the son. [They cited *Goddard* v. *O'Brien.* (1)]

VAUGHAN WILLIAMS L.J. This is an action upon a promissory note by money-lenders, who carry on business in India, against Lieutenant Temple, an officer in the Army, who, when out in India, borrowed money from the plaintiffs. The plaintiffs began to press the defendant for payment, and, not getting their money, they communicated with his father, Sir Richard Temple, in England, in the hope that they might obtain payment from him. Under these circumstances a number of letters passed between the plaintiffs and Sir Richard Temple's solicitors. [The Lord Justice then read the material portions of the letters set out above.] The only other fact which it is necessary to mention is that the plaintiffs kept the draft sent to them in respect of the promissory note, and cashed it; but, notwithstanding that, they brought an action for the balance of the amount of the note. Scrutton J. gave judgment for the plaintiffs, and the question is whether that judgment is right.

The learned judge dealt with the case largely on the footing that the question was whether the effect of the transaction between the plaintiffs and the father was that there had been an accord and satisfaction in respect of the debt due upon the note, and he came to the conclusion that there had been no such accord and satisfaction. Personally, I am inclined to agree that prima facie such an accord and satisfaction must be by virtue of an agreement made between a person who is under an obligation to another person, which he ought to have and has not performed, and that other person. I should

(1) 9 Q. B. D. 37.

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Vaughan Williams L.J.

hesitate to say that there can, properly speaking, be an accord and satisfaction in respect of a contractual obligation as between one of the parties to the contract, who ought to have but has not performed that obligation, and a stranger to the contract. I am not forgetting the judgments delivered in *Cook* v. *Lister* (1), and in particular that delivered by Willes J.; but, speaking for myself, I think that this case may be regarded in the following manner. In my judgment, this draft having been sent to the plaintiffs by Sir Richard Temple, and retained and cashed by them, we ought to draw the conclusion that the plaintiffs, who kept and cashed the draft, agreed to accept it on the terms upon which it was sent. It is worthy of observation that none of the plaintiffs were called as witnesses, and no evidence was given to negative the presumption, which, to my mind, arises from their keeping the draft, that they agreed to take it on the terms upon which it was sent. I shall assume that there was such an agreement as I have mentioned entered into between Sir Richard Temple and the plaintiffs by reason of their keeping the draft. They not only kept it, but they cashed it, and, if they changed their minds afterwards, it was too late. Under these circumstances, assuming that there was no accord and satisfaction, what form of defence, if any, could be pleaded by the defendant? In my judgment it would be that the plaintiffs had ceased really to be holders of the negotiable instrument on which they sued. They had ceased to be such holders, because, in effect, in their hands the document had ceased to be a negotiable instrument quite as much as if there had been on the acceptance of the draft by the plaintiffs an erasure of the writing of the signature to the note. There was not in fact such an erasure, but to my mind the case must be considered as standing on the same footing as if there been an erasure of the signature, and a cancellation by reason of that erasure of the promissory note, in which case, I think, the maker of the note would have had a defence, though he was not a party to the transaction in pursuance of which the note was cancelled, in the sense of being a contracting party. His defence would then have been that the document in the circumstances

(1) 13 C. B. (N.S.) 543.

had ceased to be a promissory note. But, alternatively, assuming that this was not so, and that the instrument did not cease to be a negotiable instrument, then, in my judgment, from the moment when the draft sent by Sir Richard Temple was cashed by the plaintiffs a trust was created as between Sir Richard Temple and the money-lenders in favour of the former, so that any money which the latter might receive upon the promissory note, if they did receive any, would be held by them in trust for him. I wish to say here that I do not think that it makes any difference under the circumstances that the amount of the draft sent by Sir Richard Temple was not the full amount of the promissory note, but a smaller amount, because, as between Sir Richard Temple and these plaintiffs, there was an agreement by the plaintiffs for good consideration to receive that amount in satisfaction of the note, which agreement arose from their having retained and cashed the draft. Under these circumstances, it may be asked, how could the defendant plead by way of defence? In my judgment, if I am right in saying that any moneys received on the note by the plaintiffs would be held by them in trust for Sir Richard Temple, then, without any question of resort to a Court of Equity, there might have been a defence in a Court of law on the ground that any money recoverable on the note by the plaintiffs was recoverable by them merely as trustees for Sir Richard Temple, and that, under the circumstances disclosed by the correspondence, the relations between the father and son were such that it was impossible to suppose that the father wished to insist on payment of the note by the son.

Having said thus much, I desire to add a word or two with regard to the case of *Cook* v. *Lister* (1) in the Common Pleas. If the judgments in that case are looked at, it will be found that Willes J. said, in explaining the grounds of his judgment, that, under circumstances like those of the present case, the debt is gone, because it would be a fraud upon the stranger who pays part of a debt in discharge of the whole, that an action should be brought for the debt. I have founded my judgment upon the grounds which I have already expressed, but I do not wish to be understood as thereby negativing the proposition

(1) 13 C.B. (N.S.) 543.

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that a defence might be set up on the alternative basis mentioned by Willes J. In my opinion this appeal should be allowed.

FLETCHER MOULTON L.J. I also think that the plaintiffs' action fails, and that this appeal should be allowed. The facts of this case are such that this result may be arrived at by more than one course of reasoning. I am clearly of opinion that there must be taken to have been an agreement between the plaintiffs and Sir Richard Temple, by which the plaintiffs agreed to accept the money sent by him in satisfaction of the note. No oral testimony was given at the trial, but the facts of the case appear clearly from the correspondence. In the first letter the plaintiffs applied to Sir Richard Temple, the father, in respect of his son's account with them. Then comes a letter from the father's solicitors, in which they offer the plaintiffs a certain sum in settlement of the plaintiffs' two claims against the son, one of which was on a bond and the other on the promissory note. In answer to this letter, two separate letters were written by the plaintiffs, one with regard to the bond, and the other with regard to the note. I need only refer to the latter, as the purport of the two, mutatis mutandis, is the same. The plaintiffs in that letter say "We shall be glad if you will let us know the amount for which Sir Richard Temple is prepared to settle this debt due from his son." Therefore it is clear that the plaintiffs realized that the father was proposing to settle the whole claim on the note, and that they accordingly asked what amount he was prepared to give. The father's solicitors wrote in answer one letter dealing with both claims. In the paragraph relating to the promissory note, they say: "Our instructions are, therefore, to pay you Rs.500 in respect of the principal and Rs.150 in respect of the one year's interest, making together Rs.650. We enclose draft by the National Bank of India on the Bank of Bombay, Poona, in your favour for this amount, and shall be glad to receive the promissory note in exchange." It is perfectly clear from the previous correspondence that this was an offer made for the full settlement of the claim. The plaintiffs, with knowledge that this was the money of the father, sent to them in full settlement of the claim, took the draft, and cashed

it, and kept the money. They must be taken to have known that they could only do this rightly, if they agreed to the terms that it should be in full settlement of the debt. Their action was inconsistent with the duty of an honest man, unless, at the time when they took the money, they accepted the terms on which it was offered. They must have known that they could only possess themselves of this money honestly by accepting those terms, and, knowing that, they possessed themselves of it. That appears to me to be overwhelming evidence of an acceptance by them of the proposal made to them by the father. It is contended that we ought to come to the contrary conclusion by reason of the letters subsequently written by them on December 31, by which, after pocketing the money which they must have known to be offered in settlement of the debt, they endeavoured to get payment of the debt in full from the defendant's father. We are asked to allow those letters to override the overwhelming evidence of acceptance by them of the father's offer which is afforded by their conduct. I decline to accept the conclusion of fact suggested by the plaintiffs that they dishonestly possessed themselves of the father's money, and shall presume that they did so honestly, and therefore that they accepted it in settlement of their claim against the son on the promissory note.

These being the facts, we have to consider how they affect the debt on the note in point of law. I am of opinion that by that transaction between the plaintiffs and Sir Richard Temple the debt on the promissory note became extinct. I agree with the view expressed by Willes J. in *Cook* v. *Lister*. (1) The effect of such an agreement between a creditor and a third party with regard to the debt is to render it impossible for the creditor afterwards to sue the debtor for it. The way in which this is worked out in law may be that it would be an abuse of the process of the Court to allow the creditor under such circumstances to sue, or it may be, and I prefer that view, that there is an extinction of the debt; but, whichever way it is put, it comes to the same thing, namely that, after acceptance by the creditor of a sum offered by a third party in settlement of the claim against the debtor, the creditor cannot maintain an

(1) 13 C. B. (N.S.) 543.

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Fletcher Moulton L.J.

action for the balance. That being my view, namely, that either the debt is extinguished, or that the Court will not allow the creditor to assert his claim, I will only say a few words upon two of the cases which have been cited on the subject. By the decision in *Foakes* v. *Beer* (1) the old doctrine that a debtor cannot discharge himself from his debt by payment of an amount smaller than that of the debt was recognized by the House of Lords as law of such old standing that it could not be challenged. This fully explains the decision in *Day* v. *McLea* (2), where a debtor sent a cheque to his creditor for an amount smaller than the debt, stating that it was in settlement of the debt. It was accepted, and yet it was held that there was no settlement. I have grave doubts whether *Goddard* v. *O'Brien* (3) was rightly decided, because, when the facts are looked at, it appears that the cheque was there given, not in substitution for the debt, but only as conditional payment of the amount, so that the case really stood on the same footing as payment of a less amount in discharge of a greater. But in the present case we are dealing with the question of the effect of money paid by a third person. In such a case there is no difference between payment of the total amount and payment of a portion of it only, so long as it is paid in settlement of the debt. If a third person steps in and gives a consideration for the discharge of the debtor, it does not matter whether he does it in meal or in malt, or what proportion the amount given bears to the amount of the debt. Here the money was paid by a third person, and I have no doubt that, upon the acceptance of that money by the plaintiffs with full knowledge of the terms on which it was offered, the debt was absolutely extinguished.

FARWELL L.J. I agree. Whether the facts in this case would support a plea of accord and satisfaction appears to me to be really immaterial. In my opinion, it is clear that in the events that have happened the debt became extinguished. Assuming that an accord and satisfaction must be by agreement

(1) (1884) 9 App. Cas. 605. (2) 22 Q. B. D. 610.
(3) 9 Q. B. D. 37.

between the debtor and the creditor, it occurs to me from what was said by Willes J. in *Cook* v. *Lister* (1) that the facts in this case might support such a plea. That learned judge there said, "if a stranger pays a part of a debt in discharge of the whole, the debt is gone because it would be a fraud on the stranger to proceed. So, in the case of a composition made with a body of creditors, the assent to receive the composition discharges the debt, because otherwise fraud would be committed against the rest of the creditors. And with respect to the necessity for shewing the assent of the debtor, I apprehend that it is contrary to the well-known principle of law, by which a benefit conferred upon a man is presumed to be accepted by him, until the contrary is proved." If one could arrive at the conclusion that the assent of the debtor must be treated as forming part of the bargain, it might be treated as a tripartite agreement between the father, the son, and the creditors. That seems to have been the view of Holroyd J. in *Lewis* v. *Jones*. (2) He there said: "Now, unless the agreement for the composition can be got rid of upon the ground of fraud, I think it operates as an accord and satisfaction of the original debt. The agreement imports that the creditors were to accept five shillings in the pound in full of their debts, &c. Now an acceptance of a smaller sum cannot be pleaded as satisfaction of a larger. In point of law something further is necessary to produce that effect. But I think that, when the plaintiff in this case accepted the father's note as a security for payment of the composition money, the agreement did operate as a satisfaction and extinction of the debt." I apprehend that the case was there treated as being one of a tripartite agreement between the father, the son, and the creditors. But whether that is technically correct does not matter, I think, at this time of day. If the transaction in this case were translated into its equivalent taking place in the same room between the parties, the case would hardly be arguable. Suppose, under those circumstances, the creditor asked the father what amount he would give in settlement of the debt: and the father produced 100*l*., and said he would give that amount: and the creditor thereupon took up the money and put it in his pocket, and then went away, and

(1) 13 C. B. (N.S.) 543. (2) 4 B. & C. 506.

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Farwell L.J.

afterwards sued the son for the balance of the debt. I think that it would be idle to say that he could still sue. I can see no difference in substance between that and the present case. The plaintiffs could only accept the money on the terms upon which it was offered. We were pressed with *Day* v. *McLea* (1), where the debtor himself sent a cheque for an amount smaller than that of the debt to the creditor on the terms that it should be in satisfaction of the debt. In that case, there being no consideration for the discharge of the balance of the debt, it was held that the creditor could retain the money, and sue for the balance. The same reasoning does not apply where the money is sent by a stranger, in which case it can only be accepted on the terms upon which it is sent. In the former case the creditor can reply to the debtor, "you owe me more than this, and, if you sue for a return of this, I shall set off my larger claim against it." In the latter case, the creditor has no excuse or justification for retaining the stranger's money, unless he complies with the condition on which it was paid. I agree with Fletcher Moulton L.J. that the plaintiffs cannot be heard to say that they have acted dishonestly when an honest construction can be put upon their conduct by treating their acceptance and retention of the money as being upon the terms on which it was offered. If there be any difficulty in formulating a defence at common law in such case, I have no hesitation in saying that a Court of Equity would have regarded the plaintiffs as disentitled to sue except as trustees for the father, and would have restrained them from suing under such circumstances as existed in the present case.

*Appeal allowed.*

Solicitors for plaintiffs: *Rising & Ravenscroft.*
Solicitors for defendant: *Ramsden & Co.*

(1) 22 Q. B. D. 610.

E. L.

## DUKE OF NORTHUMBERLAND *v.* COMMISSIONERS OF INLAND REVENUE.

1911
*Feb.* 15, 16.

*Revenue—Stamp Duty—Settlement—Policy of Life Insurance—Joint Power of Appointment—Restoration of Life Estate—Provision for keeping up Policy—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 104.

By a settlement made in 1892 by a father, son, and grandson, certain freehold hereditaments, being the family estates, were settled upon such trusts and to such uses as the settlors should jointly appoint, and in default of appointment to the use of the father for life, with remainder to the son and grandson successively for their respective lives with remainders over in strict settlement. By another indenture of the same date certain policies of insurance on the life of the grandson, and all moneys to become payable thereunder, were assigned to trustees to hold upon the trusts of the settlement applicable to the proceeds of sale of the family estates, if sold. This indenture contained covenants for keeping up the policies. Both indentures were duly stamped. By an indenture dated December 19, 1894, the settlors, in exercise of the joint power, appointed part of the hereditaments to the use of the father for life and the remainder to such uses as the son and grandson should jointly appoint, and in default of appointment to the use of the son for life by way of restoration of his life estate as subsisting immediately before the execution of the indenture of 1894, but so that it should be an estate in possession and not in remainder, with remainder to the use of the grandson for life, with divers remainders over in strict settlement. By the same indenture the settlors further declared and appointed that for the purposes of the policy settlement of 1892 the trusts of the indenture of 1894 should be the trusts upon which the policy moneys should be held, not under any new disposition or settlement, but on the footing of the indenture of 1894 being a restoration of the trusts thereby declared, save that the father should thenceforth have no interest therein. The indenture of 1894 contained no provision for keeping up the policies, but the covenants for payment of premiums in the policy settlement of 1892 remained applicable:—

*Held*, that money which might become payable upon a policy of life insurance was "settled" by the indenture of 1894, within the meaning of s. 104 of the Stamp Act, 1891, and that the indenture was, therefore, chargeable with stamp duty under that section; but that, as no provision was made in the indenture itself for keeping up the policies, sub-s. 2 (*a*) of s. 104 applied, and the duty was chargeable only on the value of the policies at the date of the indenture.

Case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

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On January 4, 1910, an instrument dated December 19, 1894, and made between Algernon George, Duke of Northumberland, Henry George, Lord Percy, and Henry Algernon George, Lord Warkworth, of the one part, and certain trustees of the other part, was presented on behalf of his Grace the Duke of Northumberland (formerly the said Lord Percy, and hereinafter called the appellant), by his solicitors, to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

A copy of the instrument in question (omitting particulars of the lands) formed part of the case.

The instrument was duly executed by all parties thereto and was an appointment of certain lands, cash, stock, and life policies of assurance made in exercise of a power of appointment conferred, as to the lands, stock, and cash affected by the instrument, by a settlement dated July 1, 1892, and hereinafter called the "Northumberland" settlement, and, as to the policies affected by the instrument, by the joint operation of the "Northumberland" settlement and another settlement of even date with the "Northumberland" settlement, and hereinafter called the "policy" settlement. Copies of the "Northumberland" settlement and the "policy" settlement respectively were to be referred to as part of the case, and their effect sufficiently appears from the recitals in the instrument of December 19, 1894, hereinafter set out. Both the "Northumberland" settlement and "policy" settlement had been duly stamped, the policy settlement being duly stamped under s. 104 of the Stamp Act, 1891 (1), with the ad valorem duty of 5*s.* per cent. on the

(1) The Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 104: "(1.) Where any money which may become due or payable upon any policy of life insurance, or upon any security not being a marketable security, is settled or agreed to be settled, the instrument whereby the settlement is made or agreed to be made is to be charged with ad valorem duty in respect of that money.

"(2.) Provided as follows:

"(*a*) Where, in the case of a policy, no provision is made for keeping up the policy, the ad valorem duty is to be charged only on the value of the policy at the date of the instrument.

"(*b*) If in any such case the instrument contains a

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moneys which might become due or payable upon the policies named in the settlement, i.e., on 98,200*l.*

It was admitted that 10*s.* was rightly assessed in respect of the instrument so far as it operated as a conveyance or transfer of lands. It was also admitted that the value of the cash and stock, if settlement duty thereon was payable at all, was rightly taken at 5826*l.* 19*s.* 10*d.* With reference to the policies it was admitted (1.) that if settlement duty was assessable only on the value thereof at the date of the instrument the amount so assessable was 2400*l.*, and (2.) that if settlement duty was assessable on the money which might become due or payable upon the policies the amount of such money (including bonuses) so far as ascertainable at the date of the instrument was 98,473*l.*

No new provision for keeping up any of the policies was contained in the instrument of December 19, 1894, but after the execution of the said instrument the covenants for payment of premiums on these policies contained in the settlement of July, 1892, remained applicable to them and enured for their upkeep.

The appellant contended that, in the circumstances, if settlement stamp duty was payable upon the instrument in respect of the policies, ad valorem duty so far as the policies were concerned ought to be charged only on the value of the policies at the date of the instrument, i.e., the value on December 19, 1894. The appellant had expressed his willingness to pay stamp duty on that value (though he contended as aforesaid that no duty was payable) and he offered to waive the question of liability if his offer were accepted. The duty assessed in respect of the cash and stock was small, and the appellant stated that on that account he now made no contention in respect thereof.

The Commissioners, being of opinion that the trusts under which the policies were by the instrument to be held owed their force and effect to the instrument itself, and not to the

statement of the said value, and is stamped in accordance with the statement, it is, so far as regards the policy, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped."

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"Northumberland" settlement or to the "policy" settlement, held that settlement duty was payable on the instrument; and, being also of opinion that in view of the existence in a separate deed of a covenant to pay premiums they could not find as a fact that no provision had been made for keeping up the policies within the meaning of s. 104, sub-s. 2 (*a*), of the Stamp Act, 1891, they assessed settlement duty on the value as aforesaid of the cash and stock and on the full amount of 98,473*l.* in respect of the policies. They so assessed settlement duty by reference to the heading "Settlement" in Sched. I. of the Stamp Act, 1891.

The questions for the opinion of the Court were: (1.) Whether any duty was chargeable upon the instrument in respect of the policies by reference to the heading "Settlement" in Sched. I. of the Stamp Act, 1891; and (2.) if so, whether so far as the policies were concerned the duty was assessable (*a*) only on the value of the policies at the date of the instrument of December 19, 1894, namely, upon the sum of 2400*l.*, or (*b*) upon the money which might become payable upon the policies, namely, the sum of 98,473*l.*

The indenture of December 19, 1894, so far as is material, was as follows:—"Whereas by an indenture of settlement dated the 1st day of July 1892 (hereinafter referred to as the settlement of July 1892) and made between the Duke of Northumberland and Earl Percy of the first part the Duke of Northumberland and Earl Percy and Lord Warkworth of the second part and the herein named trustees of the third part divers hereditaments of freehold tenure . . . . constituting the freehold estates . . . . of the House of Percy were conveyed limited and settled . . . . to such uses upon such trusts and with under and subject to such powers provisoes agreements and declarations as the Duke of Northumberland and Earl Percy and Lord Warkworth should . . . . by any deed or deeds with or without power of revocation and new appointment from time to time jointly direct limit or appoint And in default of and until and subject to any such joint direction limitation or appointment to such uses upon such trusts and with and subject to such powers provisoes agreements and declarations as the two survivors of them the Duke of Northumberland and Earl Percy and Lord Warkworth after the

death of that one of the three who should be first to die should . . . . by any deed or deeds with or without power of revocation and new appointment from time to time jointly direct limit or appoint And in default of and until and subject to any such joint direction limitation or appointment" as to certain hereditaments to the use of certain trustees for a term for the purposes of that term; and then "and as for and concerning all other the hereditaments and premises thereinbefore expressed to be thereby appointed and conveyed . . . . to the use of the Duke of Northumberland during his life . . . . with remainder to the use of Earl Percy during his life . . . . with remainder to the use of Lord Warkworth during his life . . . . with divers remainders over in strict settlement . . . . And whereas by an indenture dated the same 1st day of July 1892 and made between Lord Warkworth of the first part Earl Percy of the second part and Lord Algernon Percy and the Reverend Albert Baillie of the third part the policies of assurance on the life of Lord Warkworth mentioned in the schedule under that indenture written and all moneys and bonuses assured or to become payable by or under the said policies and the full benefit thereof were by Lord Warkworth assigned unto the said Lord Algernon Percy and Albert Baillie to hold the same upon the trusts and with and subject to the powers provisoes and declarations by the settlement of July 1892 and the Settled Land Acts 1882—1890 and any other Act or Acts amending those Acts or otherwise by law applicable to moneys to arise from a sale under any power in that behalf in the settlement of July 1892 . . . . of the hereditaments expressed to be appointed conveyed and settled by the settlement of July 1892 . . . . and so that the said Lord Algernon Percy and Albert Baillie . . . . or other the trustees or trustee for the time being of the indenture now in recital might either themselves so pay or apply the said policy moneys or pay them over to the trustees or trustee for the time being of the settlement of July 1892 to be so paid applied or disposed of by such trustees or trustee for the time being . . . . Now this indenture witnesseth that . . . . in exercise of the power in that behalf given or reserved to the Duke of Northumberland and Earl Percy and Lord Warkworth by the settlement of July 1892 they . . . . as settlors do

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hereby direct limit and appoint" that the parcels thereafter named "over which the Duke of Northumberland and Earl Percy and Lord Warkworth have a joint power of appointment" by virtue of the "Northumberland" settlement of July, 1892 "and also by way of appointment and not of exception" certain sums of cash and stock "but not including the policy moneys to become subject to the trusts of the said indenture of the 1st July 1892 shall henceforth subject to the charges and incumbrances hereinbefore referred to as affecting the same respectively remain and be to the uses upon the trusts and with and subject to the powers provisoes agreements and declarations hereinbefore declared concerning the same (that is to say)" as to the castles of Alnwick and Keilder and certain other mansion houses and lands "to the use of the Duke of Northumberland during his life . . . . and as to the said castles messuages lands tenements and hereditaments hereinbefore limited to the Duke of Northumberland during his life but subject to his life estate therein And also as to all other the hereditaments and premises other than and except the said sums of cash and stock and other (if any) the funds securities and personal estate hereinbefore expressed to be hereby appointed (subject as aforesaid) to such uses upon such trusts and with under and subject to such powers provisoes agreements and declarations as Earl Percy and Lord Warkworth shall by any deed or deeds with or without power of revocation and new appointment from time to time jointly direct limit or appoint And in default of and until and subject to any such joint direction limitation or appointment To the use of Earl Percy during his life . . . . by way of restoration of his estate for life as subsisting immediately before the execution of these presents but so that it shall be an estate for life in possession and not in remainder And from and after the death of Earl Percy to the use of Lord Warkworth during his life . . . . with remainder after his death to the use of the first and other sons of Lord Warkworth" and thereafter in strict settlement. ". . . . And this indenture also witnesseth that in exercise of all powers enabling the Duke of Northumberland Earl Percy and Lord Warkworth they the Duke of Northumberland Earl Percy and Lord Warkworth do hereby appoint and

declare that for the purposes of the hereinbefore recited indenture of the 1st day of July 1892 the trusts powers provisoes and declarations by these presents and the Settled Land Acts 1882—1890 and any other Act or Acts amending those Acts or otherwise by law applicable . . . . shall in so far as may be necessary be deemed to be or shall in fact be the trusts powers provisoes and declarations upon with under and subject to which by reason of the execution of these presents or otherwise the policy moneys and bonuses being or to become subject to the trusts of the said indenture of the 1st day of July 1892 are from henceforth to be held and (in so far as may be possible) not under any new disposition or settlement made thereof by these presents but under or by virtue of the said indenture of the 1st day of July 1892 and the trusts thereby declared and on the footing of these presents being for the purposes of that indenture and the trusts thereby declared a restoration except as regards the Duke of Northumberland and the hereditaments and the premises in which he under these presents has a life estate of the uses and limitations of the settlement of July 1892 and the trusts powers provisoes and declarations therein contained so far as the uses and limitations trusts powers provisoes and declarations of and contained in the settlement of July 1892 and of and in these presents are in substance or effect identical And the Duke of Northumberland Earl Percy and Lord Warkworth do hereby appoint and declare that all the said policy moneys (including bonuses) shall be held in trust accordingly and so that the Duke of Northumberland shall henceforth have no interest therein and so that the trustees or trustee for the time being of the said indenture of the 1st day of July 1892 may either themselves pay or apply the said policy moneys (including bonuses) in manner by the joint effect of that indenture and these presents directed or may pay them to the settlement trustees of and under these presents to be so paid applied or disposed of by the settlement trustees."

*Danckwerts, K.C.*, and *Tomlin*, for the appellant. The indenture of December 19, 1894, is not an instrument whereby money, which may become due or payable upon a policy of life insurance,

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"is settled" within the meaning of s. 104, sub-s. 1, of the Stamp Act, 1891, and, therefore, no duty is chargeable in respect of that indenture. That section reproduces s. 124 of the Stamp Act, 1870, and s. 12 of the Stamp Act, 1864, the latter enactment having been passed in consequence of the decision in *Sanville* v. *Inland Revenue Commissioners* (1) that a settlement of a life policy was not a settlement of a definite and certain principal sum of money. It follows also from that decision that for the same reason this instrument is not within the term "settlement" in the schedule to the Stamp Act, 1891: *In re Alsager* (2); *Onslow* v. *Inland Revenue Commissioners* (3); and the question therefore is whether the instrument is within s. 104. The effect of the instrument is, by means of the exercise of the triple power of appointment contained in the "Northumberland" settlement, to cut out the Duke of Northumberland's life estate in everything except the residential property, and to give to Earl Percy and Lord Warkworth a joint power of appointment over the rest of the property, but not including the policies of insurance. The policies still follow the trusts of the "policy" settlement so far as the instrument is a restoration of that settlement, with the exception of the Duke's life interest and the triple power of appointment. It is not a new settlement, because there is the limitation to the use of Earl Percy in restoration of his life estate under the original settlement. There is no creation of new life estates, but a restoration of the former estates, with this difference only, that the Duke's life estate (except in the residential properties) has been got rid of. The object of the restoration was to keep alive the old powers of the life estates: *In re Du Cane and Nettlefold's Contract* (4); *In re Wright's Trustees and Marshall* (5); *In re Cornwallis-West and Munro's Contract* (6); *In re Mundy and Roper's Contract* (7); Davidson's Precedents, 3rd ed., vol. 3, p. 594. For the purpose of the Stamp Act the real and true meaning of the instrument must be ascertained; the description of it given by the parties is immaterial: *Limmer*

(1) (1854) 10 Ex. 159.
(2) (1864) 2 H. & C. 969.
(3) (1890) 24 Q. B. D. 584.
(4) [1898] 2 Ch. 96.
(5) (1884) 28 Ch. D. 93.
(6) [1903] 2 Ch. 150.
(7) [1899] 1 Ch. 275.

*Asphalte Paving Co.* v. *Inland Revenue Commissioners* (1); *In re De Hoghton.* (2) The real and true character of this instrument is that it is one by which certain portions of the original settlements are excised, but no new estates are created and in all other respects the original settlements are restored and left subsisting. All the essentials of a settlement are lacking in this instrument: *Massereene* v. *Inland Revenue Commissioners.* (3)

Assuming the instrument is a settlement within s. 104, it contains no provision for keeping up the policies, and, therefore, under sub-s. 2 duty is only payable on the value of the policies at the date of the execution of the instrument. The "policy" settlement did contain a provision for upkeep, and the case states that the covenant remains applicable to the policies. The Crown is, therefore, seeking to make the appellant pay the duty twice over. It is a well-recognized proposition with regard to taxing Acts that unless a case is brought exactly within the letter of the law the tax cannot be recovered: *Partington* v. *Attorney-General* (4); *Tennant* v. *Smith* (5); *Attorney-General* v. *Earl of Selborne.* (6) The language of s. 104, and particularly the use of the words "no provision is made," clearly indicates that, unless a provision for keeping up the policy is contained in the instrument which it is sought to charge with stamp duty, the duty is not payable on the money which will become due on the policy, but only on the value of the policy at the date of the instrument; and it is quite immaterial that there may be some other instrument in existence which does contain a provision for the upkeep of the policies.

*Sir Rufus Isaacs*, *A.-G.*, and *W. Finlay*, for the respondents. For the purposes of this case the Court has to consider what the instrument in question is, not what the transaction was which it was desired to carry out by means of that instrument. It is an instrument of appointment with successive limitations. It came into existence for the purpose of effecting a resettlement of the property contained in the two earlier settlements. It is,

(1) (1872) L. R. 7 Ex. 211.
(2) [1896] 1 Ch. 855.
(3) [1900] 2 I. R. 138.
(4) (1869) L. R. 4 H. L. 100, at p. 122.
(5) [1892] A. C. 150, at p. 154.
(6) [1902] 1 K. B. 388.

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therefore, a settlement within s. 104 and the First Schedule: *Russell* v. *Inland Revenue Commissioners*. (1) It is none the less a settlement because the disposition of the property under it is to a certain extent subject to the same uses and trusts as in the former settlements. It is, however, incontrovertible that the position has been changed. The triple power of appointment is spent; the new power of appointment is given to two persons instead of three; the Duke of Northumberland has no longer a life estate, except in a portion of the property; and the appellant obtained a life estate in possession instead of in remainder. The correctness of the general principles with regard to the construction of taxing Acts laid down by Lord Cairns in *Partington* v. *Attorney-General* (2) and by Lord Halsbury in *Tennant* v. *Smith* (3) cannot be questioned, but there is no authority for the proposition, for which the appellant in effect contends, that if a particular instrument clearly comes within the language of a taxing Act it is nevertheless not to be taxed if the transaction to which it relates is one which could have been carried out by another method not involving a liability to taxation.

Secondly, this case is not one within sub-s. 2 (*a*) of s. 104. There is here a provision for keeping up the policies which ex hypothesi were settled by the indenture of 1894, namely, in the "policy" settlement of 1892. It is not necessary for the purpose of the sub-section that the provision should be contained in the particular instrument which is sought to be taxed. It is sufficient if there is in fact some provision made either contemporaneously with, or previously to, the instrument in question by which an enforceable liability to maintain the policies is imposed. It is for the appellant who claims the benefit of the exemption in sub-s. 2 (*a*) to bring himself within the language of the sub-section, and if he is unable to do so he remains liable to the general tax imposed by sub-s. 1. The object of providing two different scales of taxation was to get rid of the hardship which which would otherwise have existed of making the full duty payable in a case where, there being no provision for keeping up the policy, it might lapse at any moment. For the purpose of

(1) [1902] 1 K. B. 142. (2) L. R. 4 H. L. 100, at p. 122.
(3) [1892] A. C. 150, at p. 154.

carrying out that object it is immaterial whether the provision is contained in the settlement or in some other instrument. Stress was laid in the argument for the appellant on the fact that the language of sub-s. 2 is in the present tense. That was obviously necessary because the moment of time to be considered is the execution of the instrument. The Court will not, in construing s. 104 of the Act of 1891, place reliance on cases like *Sanville* v. *Inland Revenue Commissioners* (1) and *In re Alsager* (2), which were decided before the corresponding section of the Stamp Act, 1864, came into force. [They also referred to Farwell on Powers, 2nd ed., p. 276, and *Sweetapple* v. *Horlock.* (3)]

*Danckwerts, K.C.*, in reply, referred to *Rex* v. *Special Commissioners of Income Tax, Ex parte University College of North Wales* (4), and *In re Stucley's Settlement.* (5)

HAMILTON J. The questions raised by this case are whether an instrument dated December 19, 1894, is one which comes within s. 104, sub-s. 1, of the Stamp Act, 1891; and, if so, upon what value or amount the stamp duty shall be calculated in regard to certain policies of life insurance to which it refers. In 1892 a settlement, called in the case the "Northumberland" settlement, dated July 1, 1892, of the freehold estates of the House of Percy was executed by the Duke of Northumberland, Earl Percy, Lord Warkworth, and certain trustees, which settled those estates and also certain sums of money in a particular way. There was also another settlement of the same date, called the "policy" settlement, which dealt with certain policies of insurance upon the life of Lord Warkworth. Both the "Northumberland" settlement and the "policy" settlement were duly stamped.

In the year 1894 it was desired to make rearrangements with regard to the lands, moneys, and policies dealt with by the "Northumberland" settlement and the "policy" settlement, and accordingly the instrument now in question was executed by the same parties as executed the "Northumberland" settlement. The

(1) 10 Ex. 159.
(2) 2 H. & C. 969.
(3) (1879) 11 Ch. D. 745.
(4) (1908) 98 L. T. 446.
(5) (1870) L. R. 5 Ex. 85.

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substance of the change was that the life interest of the Duke of Northumberland to which the life interests of Earl Percy and Lord Warkworth were in turn subject, instead of being a life interest in the whole of the matters settled in 1892, real and personal, should be limited to a life interest in what may be described briefly as the family residences, and, notably, to Alnwick Castle, Keilder Castle, and other mansion houses and lands. It was desired to do this in the form of an execution of a power of appointment given by the "Northumberland" settlement, while making that power of appointment take effect as a restoration of the uses, limitations, and estates of the settlement of July, 1892. The point upon the instrument in question is whether in effecting that purpose, and effecting it in that way, an occasion arose which is within the words of s. 104, sub-s. 1, of the Stamp Act, 1891, "Where any money which may become due or payable upon any policy of life insurance . . . . is settled or agreed to be settled . . . ." The "Northumberland" settlement is set out quite sufficiently in the recitals to the instrument now in question. [The learned judge read the indenture as set out above down to the end of the provisions for the exercise of the power of appointment, and continued.] The first or triple power of appointment conferred by the "Northumberland" settlement might cause difficulties if instead of being exercised it were got rid of in any other way. Accordingly it was got rid of by exercising it so that the power should then be spent. I adopt the principle submitted as the true rule in Farwell on Powers, 2nd ed., p. 276, "The exercise of a power of appointment divests the estates limited in default of appointment and creates new estates, and that, too, whether the property be real or personal." Instead of exercising a power of appointment and then and there recreating anew the estates previously limited, conveyances often preserve the estates previously limited by declaring that what is done in exercise of the power of appointment shall be by way of restoration of the estates previously existing. Especially in resettlement by father and son, but in other cases also, it has been found convenient, for the purpose of what is called technically overreaching family charges created in the interim, to exercise

a power of appointment with a declaration that the estates thereafter created are created by way of restoration of the former estates. The matter is discussed at some length in Davidson's Precedents, 3rd ed., vol. 3, at p. 594. The practice of conveyancers in this regard has been alluded to recently and its effect discussed, notably in *In re Mundy and Roper's Contract* (1) by Kekewich J., and in the judgment of Chitty and Lindley L.JJ. in the Court of Appeal. Both those judgments, after mentioning that in that case, for reasons which it is not necessary to go into, the old practice of creating the life estate and limiting it in restoration of the old life estate had not been followed, speak of such an exercise of the powers as a resettlement, and in the judgment of the Court of Appeal it is said (2): "The object of this restoration is well known; it was to keep alive the old powers annexed to the life estate." If the life estate was defeated, which would be the effect of the exercise of the power, and was not restored, the creation of a new life estate would give a priority to charges validly created in the meantime. The instrument now in question, therefore, proceeded thus: [The learned judge read the rest of the indenture, and continued.] The effect of the change made in 1894 is that the estate taken by the then Earl Percy under the appointment differed from that which he would have taken in default of appointment in two respects. It was immediate instead of being in remainder, and it was absolute or more nearly absolute than before, instead of being defeasible by the exercise of either one or other of two powers of appointment. That the change was one of substance cannot be denied. The estate of the appointee, Earl Percy, was a new estate to this extent, that it differed in quantum of interest from that conferred by the limitations in default of appointment. I am using language taken from the judgment of Stirling L.J. in *Attorney-General* v. *Earl of Selborne* (3), not that the decision in that case is relevant to the decision in the present case, but because the language of the Lord Justice is precise, and is the language of the conveyancer's art, and I feel safer in employing it than in

(1) [1899] 1 Ch. 275. (2) [1899] 1 Ch. at p. 294.
(3) [1902] 1 K. B. at p. 398.

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venturing to paraphrase it by expressions of my own. The consequence is that the instrument in question effected a change. The restoration which the parties undoubtedly intended to make was a restoration pro tanto. It was not and could not be an absolute restoration of the status quo before the indenture of 1894. The law, no doubt, in a matter of this kind looks to the substance of the transaction and not merely to the form, be it a conveyancing form or otherwise. No juggling with words avails to escape taxation which the reality of the instrument involves, but the law will give effect to the real intention which the parties have expressed. Looking at the substance of the matter here, and not the mere method of conveyancing, there was a change made by this instrument which may be called a disposition of the Duke of Northumberland's life interest to the benefit of the next remainderman or next person standing in reversion. The instrument is made upon an occasion where money which may become due or payable upon a policy of life insurance was settled. No definition of "settlement" is given anywhere. In the schedule the word "settlement" is the index word to a paragraph which imposes tax upon any instrument "whereby any definite and certain principal sum of money is settled or agreed to be settled." The test of "settlement" and "settled" appears to be what is done, not the classifications of conveyancers. Is it an instrument "whereby any definite and certain principal sum of money is settled"? The definition of "settlement," which is a statutory one, in the Settled Land Act of 1882, s. 2, proceeds upon the same methods: "A deed or other instrument is a settlement under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession," though a settlement within the Stamp Act, 1891, is a term applying to instruments of very much wider scope than the instruments within the Settled Land Act of 1882. Subject to the observation that the Legislature could have used the word "disposition" if it had wished—a word used in the exemptions at the end of the schedule to the Act—"settled" in s. 104 may be paraphrased by the words "disposed" or "disposition is made." If that is so, a new disposition was made

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of the interests in the policy moneys contingently to be paid upon these policies, differing from the dispositions made in 1892, and therefore creating a settlement in 1894. The result is that the instrument comes within s. 104, sub-s. 1, and is liable to be taxed.

Now comes the question, and probably the most material question, in this case, whether the tax is to be charged on the value of the policy at the date 1894, which was small, or on the value of the policy in the events which have happened now, which is large. The matter turns upon sub-s. 2 (*a*) of s. 104, which is expressed as a proviso, and is strictly a proviso and not an exception. There are many dicta as to the principles upon which these Acts must be construed. On the one hand, just as the Crown must clearly bring the subject within the section of charge, the subject, to escape a general liability by means of exemption, must clearly bring himself within the exemption. On the other hand, in *Rex* v. *The Special Commissioners of Income Tax, Ex parte University College of North Wales* (1), Lord Alverstone C.J. said, "This is an exemption in a taxing Act, and therefore by the rule of law the exemption is to be construed widely." All these questions of construction are summed up in the general proposition stated by Lord Halsbury in *Tennant* v. *Smith* (2), that, "inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed." This being a proviso the proposition is that the Crown, having established that some duty is chargeable, has further to shew what duty is chargeable, and has therefore to deal with the proviso. It is not a case in which the Crown having shewn that the subject is chargeable with some duty, the subject has to shew that he is entitled to the benefit of a reduction of duty. There is no decision upon this section that assists me, and it is unnecessary to discuss decisions prior to the passing of the Act of 1891. [The learned judge read s. 104.] It is said on behalf of the Crown that the meaning of those words, and the obvious intention

(1) 98 L. T. at p. 447. (2) [1892] A. C. at p. 154.

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of the Legislature, is that if the policy is one which is not, or has not been, provided with means for its upkeep, then it is a policy chargeable upon its business value, measured by its value at the date of the instrument, and not taking into account the prospective but uncertain chance of any further premiums being paid, but that if it is a policy of which it may be predicated that provision is or has been made for its upkeep, then it is to be deemed that that provision, which it is admitted must be in the form of legal obligation and not mere financial probability, will be effective, and thereupon the policy is to be taxed upon its entire policy moneys. It is contended for the appellant that the words of the section must be construed exactly as they stand, and that the words do not indicate anything but provision in the same instrument as that which is the subject of charge. Either contention might have been expressed in different words, perhaps with greater clearness, in favour of either of the two opposite views. The object of the section is that where it is reasonably to be expected owing to the obligations that have been entered into that the policy will be kept up, it is then fair to stamp it as a settlement according to the money ultimately payable under the policies so kept up; but where it is a matter of entire uncertainty whether any one will keep up the policy because no one has become legally bound to do so, then it is only fair to the subject to impose the stamp on the present value of the policy without regard to prospects of enhanced value. The present case is the very case expressed in the passage cited from the judgment of Lord Cairns in *Partington* v. *Attorney-General* (1): "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be." It seems to me to be within the spirit of this law to tax the settlement of a policy which is fortified by a legal obligation for its upkeep on its face value, and to tax the settlement of a policy which is not so fortified on its

(1) L. R. 4 H. L. at p. 122.

actual value; but as it does not appear to me that the words of the section effect that object, I should be falling into the very error pointed out by Lord Cairns if I were to endeavour to extend the words. The argument for the Crown involves reading the words "Where no provision is made for keeping up the policy" as an adjectival clause qualifying "policy," as though it were dealing with the case of a policy of which it may be predicated that provision exists for its upkeep. If that were the idea which the words were intended to express I should have thought that the words would have been "Where, in the case of a policy, there is provision for keeping up the policy, the ad valorem duty is to be charged," or "Where, in the case of a policy, provision is or has been made for keeping up the policy, then the ad valorem duty is to be charged." In fact the expression is in the present tense, and is "no provision is made." Furthermore, the words "is made" occur both in sub-s. 1 and sub-s. 2. In sub-s. 1 it is "the instrument whereby the settlement is made is to be charged." Why, when you come to the words "no provision is made for keeping up the policy," are you to be deemed to be referring to any other instrument than the one referred to in the first sub-section? The object of this taxation is to tax the instrument and not the transaction, and as an instrument is being dealt with throughout, and the instrument whereby the settlement is made is to be charged, the necessary reading of the sub-section is that where in the case of a policy no provision is made by the instrument which makes the settlement for keeping up the policy, then the ad valorem duty is to be charged on the value of the policy at the date of the instrument. It appears to me, therefore, that, holding the Crown to the actual language used, it has not brought this instrument within its right to claim stamp duty as upon a settlement of a policy or policy moneys so attended by provisions for the upkeep as to make the calculation of the duty ad valorem upon the whole of the policy moneys.

It may be that persons may seek to avoid liability to stamp duty on the full value by the device of excluding from their instrument of settlement the provision for the upkeep of the policy. No such consideration applies in this case. The

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provision for the upkeep of this policy was made in 1892, and stamp duty was duly paid upon it then. It has simply enured to the protection of the policy after 1894, for the covenant for the upkeep has not been in any way discharged. There is no connection that I know of between the circumstances of the covenant for the upkeep in 1892 and the form of the transaction in 1894. If hereafter endeavours should be made to escape the full duty by excluding from the instrument whereby the settlement of the policy is made the provisions for the upkeep, I have no doubt that the Courts will find here, as they have found in many similar cases, means of thwarting any mere subterfuge, and of enforcing the stamp due upon the settlement really effected. Except by way of safeguard, I do not think that I need deal with that matter further.

The appeal, therefore, succeeds on what I conceive to be the major issue, namely, that the appellant is not bound to pay stamp duty on the full ad valorem value of the policy moneys. He is, however, liable to pay duty upon the instrument on the value it had in 1894. The appellant having succeeded in substance ought to have the costs of the appeal.

*Judgment accordingly.*

Solicitors for appellant: *May, How & Chilver.*
Solicitor for respondents: *The Solicitor of Inland Revenue.*

F. O. R.

## THE KING *v.* CORPORATION OF TYNEMOUTH.

1911
*May* 10.

*Local Government—Laying out New Street—Plan—Approval of Local Authority—Restrictive Covenant—Impossibility of complying with By-law—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 158.

The owner of a building estate deposited with the local authority plans of works intended to be executed by him, including, inter alia, a new street of the minimum width permitted by a local by-law. Part of the site of the new street lay on a field which was subject to a restrictive covenant preventing the field from being used for the purpose of a street. The local authority refused to approve the plans on the ground that the existence of the covenant made it impossible for a new street of the width shewn on the plans to be constructed:—

*Held*, that the local authority were entitled to refuse to approve the plans on that ground.

Rule nisi to the mayor, aldermen, and burgesses of the borough of Tynemouth acting as the urban sanitary authority for the borough to shew cause why a writ of mandamus should not issue directed to them commanding them to consider and determine according to law the matter of an application by one Joseph Cowper that the urban sanitary authority should approve and signify in writing their approval of certain plans submitted by Cowper for the laying out of a certain estate known as the Rosetta estate within the borough.

It appeared that Cowper, who was the owner of a building estate within the district of the corporation of Tynemouth, had submitted to the corporation plans of buildings and new streets which he proposed to erect and lay out on the estate. A part of one of the proposed new streets, which street as shewn on the plans was intended to be 40 feet wide, the minimum width necessary to comply with a by-law of the corporation, in fact lay throughout the entire length of the street on a field which was separated from the rest of the land by a fence. The estate had been purchased by Cowper at a sale by public auction in April, 1910, and the conditions of sale stipulated that the purchaser should perform and observe a certain covenant relating to the field in question, which covenant provided that the owners for the time being of the field were bound to keep the same open and use it as arable or pasture land or as lawns

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shrubberies, or gardens, and for no other purpose whatsoever. At the time the plans were submitted an action was pending in the Chancery Division, in which the vendors of the land were seeking to enforce against Cowper the performance of this covenant. The town improvement committee of the town council, to whom was delegated the duty of considering plans of proposed new streets and buildings submitted to the corporation for approval under s. 158 of the Public Health Act, 1875, were of opinion that by reason of the existence of the restrictive covenant it would not be possible for the proposed new street shewn on the plan to be constructed so as to comply with the by-law which required the width of new streets to be 40 feet; and the committee informed Cowper that before they could approve the plans he must satisfy them that it was in his power to lay out the road in the manner shewn on the plans. Cowper declined to discuss this question with the committee, who thereupon disapproved the plans. Their decision was confirmed by the council.

The rule nisi was moved for and granted on the ground that the plans were in accordance with the by-laws, and that there was no valid ground for their disapproval.

*Danckwerts, K.C.*, and *W. Mackenzie*, for the corporation, shewed cause against the rule. The duty of the local authority with regard to plans of new buildings and new streets is, under s. 158 of the Public Health Act, 1875, either to approve or disapprove of the work shewn on the plans. If a local authority in disapproving a plan has acted bona fide and within its jurisdiction, this Court cannot interfere in the matter. It is within the jurisdiction of the local authority to consider whether it is practically possible to execute the works shewn on the plans. When once a plan has been approved the building owner may proceed with the work, and if it should subsequently appear that the work cannot be carried out so as to comply with the by-laws, the local authority, having given their approval, are debarred from taking proceedings to enforce compliance with the by-laws: *Thompson* v. *Failsworth Local Board*. (1) In the present case

(1) (1881) 46 J. P. 21.

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the local authority were entitled to withhold their approval unless and until the applicant satisfied them that it was physically possible to lay out the new street of the width shewn on the plan; but by reason of the existence of the restrictive covenant the applicant could not, or did not, produce any proof that this could be done, and the local authority, therefore, acted within their powers in disapproving the plans. [They also referred to *Rex* v. *West Hartlepool Corporation*. (1)]

*Lowenthal*, for the applicant, in support of the rule. The duty of the local authority under s. 158 is to see that the proposed new buildings or new streets are in accordance with the by-laws and do not constitute an infringement of any public right, for, as was said by A. L. Smith L.J. in *Reg.* v. *Tynemouth Rural District Council* (2), "It has been decided on many occasions that a local authority cannot disapprove plans unless the plans are in contravention of a lawful by-law or some statute." It may be conceded that if it be the fact, known to the local authority, that the person submitting the plan is not the owner of the land on which it is proposed to erect the new buildings, the local authority are not bound to approve the plan. But they cannot call upon the applicant to prove his title; still less can they enter upon the consideration of some question between the applicant and a third person and decide that question adversely to the applicant. In *Ex parte Crosby* (3) a rule nisi was granted for a mandamus to a local authority to approve plans which they had disapproved on the ground that the applicant had not the right of building on the land in question. In the present case the plans shew that the proposed new street will comply with the by-law. If when the work is being executed the existence of the restrictive covenant proves to be an obstacle to the due completion of the work, the applicant must either get rid of the covenant or submit to the work being stopped. For the purpose of the approval or disapproval of the plans it is immaterial, and the local authority had no jurisdiction, to consider whether the restrictive covenant exists in fact or is binding on the applicant. *Thompson* v. *Failsworth Local*

(1) (1901) 18 Times L. R. 1. (2) [1896] 2 Q. B. 451, at p. 454.
(3) (1877) 41 J. P. 740.

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*Board* (1) is not in point, for the local authority in that case must be taken to have approved a plan which shewed on its face that the applicant was not the owner of sufficient land to make the new street of the requisite width.

LORD ALVERSTONE C.J. The only question which we have to decide in this case is whether the local authority acted within their powers in disapproving the plan submitted for their approval by the applicant, the ground of disapproval being that by reason of the existence of a restrictive covenant it was impossible to lay out the street in the manner shewn on the plan. It is in my opinion incorrect to say that this was merely a question of title which the local authority had no power to consider. I must not, however, be understood as laying down as a matter of principle that a local authority, when considering plans of new streets, are entitled to inquire into the title of the person submitting the plans to the land on which it is proposed to lay out the new street; it is, however, within the jurisdiction of the local authority to inquire into any matters which tend to shew that the new buildings or streets as delineated on the plans cannot in fact be carried out. In this case the plan shewed that it was proposed to lay out a new street 40 feet wide. Along the whole length of the land on which the new street was to be laid out there was a fence, and if that fence remained there it was impossible that the width of the new street could be 40 feet. It was known to the local authority that there was in existence a restrictive covenant with regard to the user of the land on one side of the fence, and that litigation was pending against the applicant with regard to enforcing that covenant. There was therefore a serious question whether it would be in the power of the applicant to lay out the street in the manner shewn on the plan.

It is contended on behalf of the applicant that as the plan shewed that it was proposed to lay out a new street of a width sufficient to comply with the by-laws of the local authority, they were not entitled to consider the question whether it was in fact possible to carry out the plan. The consequence of adopting

(1) 46 J. P. 21.

that argument would be that a local authority would be bound to approve a plan, although the land in question belonged to some one other than the applicant, or although there might be some structure on the land the removal of which was necessary before the plan could be carried out. A person who comes to this Court asking for a mandamus to a local authority to approve plans must shew that the local authority have based their disapproval on a ground which is outside their jurisdiction. But, apart from authority, I am of opinion that it is within the jurisdiction of a local authority to take into consideration any matters which tend to shew that it is impossible for the applicant to carry out the works shewn on the plans. It was said that that question would only become relevant when an attempt was being made to carry out the work. I do not agree. The local authority are entitled to consider whether the state of things existing at the time of the application to approve the plans renders the plans impracticable.

The decision in *Thompson* v. *Failsworth Local Board* (1) is an authority which supports this view. In that case plans had been submitted to and sanctioned by the local authority for the erection by the appellant of six new houses, and on the plan were the words "new street 10 yards wide," which was the width required by the local by-laws. In fact the line of the houses as shewn on the plan was within 9 feet of the boundary of the appellant's land, and it was therefore impossible for him to make the new street of the requisite width. Some years after the houses had been erected he was summoned and convicted for disobeying the by-law in not having left a space of 30 feet for the new street. The Divisional Court quashed the conviction. Lord Coleridge C.J in giving judgment said: "The local board, therefore, has had a plan and has chosen to sanction it without apparently making any inquiry as to the number of feet in front of the houses which can be made into a road of that width . . . . Can it be said that if the local board have once agreed to these houses being built according to the plan, leaving only nine feet in front for the proposed new street, he is to take down the houses when they chose to have the new street made. It would be most unjust to

(1) 46 J. P. 21.

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fine a defendant for not doing something which was no longer possible, and which he might have been able to do if the local board had taken the proper steps to see to the practicability of its being afterwards done"; and Manisty J. said: "After the plan is approved and acted on, and it turns out that the appellant has not the means of making a street, then the injustice is great of fining him for not doing what he cannot do."

In my opinion it follows from those judgments that it is within the power, and probably is also the duty, of the local authority, when considering whether a plan shall be approved, to inquire whether it is in fact practicable to carry out the works as shewn on the plan; otherwise the local authority having sanctioned an impracticable plan may find themselves subsequently precluded from enforcing their own by-laws. The case of *Ex parte Crosby*(1), to which we have been referred, was a case where a rule nisi for a mandamus was granted on the statement of counsel that the local authority had refused to approve a plan on the ground that in their opinion the applicant was not entitled to build on the land in question. There is no record of any further proceedings in the case, and it cannot be regarded as an authority on the question. For these reasons I am of opinion that this rule must be discharged.

PICKFORD J. I am of the same opinion.

LUSH J. I agree.

*Rule discharged.*

Solicitors for applicant: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-on-Tyne.*

Solicitors for defendants: *Baker & Co., for Stanley Wilson, Town Clerk, Tynemouth.*

(1) 41 J. P. 740.

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
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*March* 29;
*April* 11.

## GOVERNORS AND GUARDIANS OF THE FOUNDLING HOSPITAL *v.* CRANE AND ANOTHER.

*Deed—Delivery of Instrument as Escrow—Assignment of Lease—Delivery to take effect on Death of Assignor—Testamentary Document.*

H., who was the assignee of the lease of a dwelling-house, signed and sealed a document purporting to be an assignment of the lease by him to one Mrs. B., but of which the date was not filled in, and delivered the document to his solicitors upon terms set forth in a letter addressed to him by them as follows: "We acknowledge that you have to-day executed the assignment of your lease to Mrs. B. as an escrow, and that we are to retain it on your behalf until you send instructions to complete the deed. In the event of your dying before the deed is completed, we understand that we are to consider the deed as having been completed before your death, and to take what steps are necessary to vest the lease in Mrs. B., should she wish it. In the event of Mrs. B. dying before the assignment is completed, you will of course send us further instructions as to what is to be done with the premises." Mrs. B. signed and sealed the document at or about the time when H. did so, but the Court inferred from the circumstances that she did so merely by way of acquiescence in the arrangement, whatever it was, intended by H. The document was not attested so as to satisfy the requirements of the Wills Act. H. died without having given any further instructions in the matter. He occupied, and retained the title deeds of, the house, and paid the rent, rates, and taxes in respect thereof until his death, and had, subsequently to the time when the before-mentioned document was delivered to his solicitors as aforesaid, been party to a deed, reciting that the term was vested in him, by which the lessors granted him permission to make a structural alteration in the house. Mrs. B. survived him:—

*Held*, that the proper inference from the facts was that the above-mentioned document was never legally delivered by H., either absolutely as a deed, or as an escrow, and therefore was inoperative.

A document purporting to be a deed of conveyance by a person of his own property, which is delivered by him on a condition that it shall only become operative upon his death, is a testamentary document, and therefore cannot take effect as an escrow.

APPEAL from the judgment of Scrutton J. in an action tried by him without a jury.

The action was by the plaintiffs, as lessors of a dwelling-house, No. 38, Brunswick Square, situate in the parish of St. Pancras, in the county of London, against the defendants, as executors of

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an assignee of the lease, for recovery of possession of the premises as upon a forfeiture for non-payment of rent, and for half a year's rent due in respect of the same on June 24, 1910.

The defendants pleaded by way of defence that the lease of the said premises had been assigned by their testator to one Mrs. Brown before the rent claimed became due, and that they never entered into nor were in possession of the premises, and claimed no interest therein.

The premises in question had been let by the plaintiffs to one Buckland for a term of thirty years from December 25, 1898, at a yearly rent, the lease containing the usual covenants, including a covenant not to assign without the written consent of the lessors, and a condition of re-entry for breach of the covenants. In August, 1902, the term was assigned by Buckland with the consent of the lessors to one Annie Davison, and on September 26, 1904, she, with the consent of the lessors, assigned the term to one Robert Hoe, since deceased, of whose will the defendants were the executors.

It appeared that Robert Hoe, the testator, who was an American citizen, residing for the time at the house in question, was in 1905 desirous of making some arrangement by which the benefit of the lease of the premises should be secured to the before-mentioned Mrs. Brown at some future time, without leaving it to her by will, and had consulted solicitors named Hopgoods & Dowson as to how his wishes in this respect might be carried into effect. By a letter which they wrote to him on the subject dated September 8, 1905, they suggested certain modes of giving effect to his wishes, but that there might be difficulties in the way of carrying them out, and concluded by saying "We propose therefore to carry out the arrangement in the manner you suggested, namely that you should execute an assignment of the lease to Mrs. Brown, and leave it with us as an escrow to be dated and completed on receipt of written instructions from you, at any time, or, in case of your death, to be considered as if it had been completed immediately preceding your death." On September 9, the next day, Mr. Hoe accordingly signed and sealed a document, which purported to be an assignment by him of the lease of No. 38, Brunswick Square to Mrs. Brown, and

handed it over to Messrs. Hopgoods & Dowson, the space for the date of the document being left blank. A letter written on the same day by the solicitors to Mr. Hoe set forth the effect, as they conceived, of what had been done in respect of the assignment of the lease in the following terms: "Dear Sir,—38, Brunswick Square: We acknowledge that you have to-day executed the assignment of your lease to Mrs. Brown as an escrow, and that we are to retain it on your behalf until you send us instructions to complete the deed. In the event of your dying before the deed is completed, we understand that we are to consider the deed as having been completed before your death, and to take what steps are necessary to vest the lease in Mrs. Brown, should she wish it. In the event of Mrs. Brown dying before the assignment is completed, you will of course send us further instructions as to what is to be done with the premises. We shall be glad if you will kindly write us a letter confirming the above." The before-mentioned document was not attested so as to satisfy the requirements of the Wills Act.

The document was signed and sealed by Mrs. Brown, probably at or about the time when it was signed and sealed by Mr. Hoe, but, as will be seen from the judgments, the Court of Appeal inferred from the circumstances that she was previously made aware of, and acquiesced in, the arrangement, whatever it was, intended by Mr. Hoe. On September 22, 1909, Mr. Hoe died without having given any further instructions in the matter. He occupied, and retained the title deeds of, the house, and paid the rent, rates, and taxes in respect thereof, till his death. On August 16, 1907, he was party to a deed, reciting that the term was vested in him, by which permission was given to him by the lessors to make a doorway through the wall of the house into the house next door. Mrs. Brown survived him. Subsequently to his death the solicitors, Messrs. Hopgoods & Dowson, with a view to completing the assignment of the lease in accordance with their instructions, inserted September 20, 1909, as the date of it. Mrs. Brown had been living in the house for some time after Mr. Hoe's death, but had vacated the same. The defendants never entered into possession of the premises.

The learned judge with some doubt gave judgment for the

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defendants, holding, upon the authority of *Perryman's Case* (1) and *Graham* v. *Graham* (2), that there was a valid delivery of the deed of assignment by Mr. Hoe as an escrow to take effect upon his death if Mrs. Brown survived him.

March 29. *Buckmaster*, K.C., and *E. M. Pollock*, K.C. (*Courthope-Munroe* with them), for the plaintiffs. The delivery of a deed is independent of its signature and sealing. It is a matter of intention. A person may sign and seal a deed, and even go through the form of delivering it, and yet, if the circumstances shew that there was no intention to deliver it as an operative instrument, there will be no execution of the deed in law. Clearly it was not intended in this case that the assignment of the lease should take effect when it was signed and handed to the solicitors. Moreover the deed in question cannot be considered as having been delivered as an escrow. In order to constitute delivery of a deed as an escrow, there must be delivery of it, upon a condition that it shall become operative upon the happening of some event, to a person who for that purpose must be a stranger quoad the person delivering it, and not merely his agent to hold the deed. The delivery of a deed to a person, as agent for the party delivering it, to hold it until further instructions are given by that party, cannot constitute delivery of the deed as an escrow. The condition upon which an escrow is to become operative cannot be dependent upon the mere volition of the party delivering the deed. It is submitted that the true inference from the facts in this case is that there was no delivery of this deed of assignment at all, either absolutely as a deed, or as an escrow, but it was merely signed and deposited with Mr. Hoe's solicitors so as to be ready for delivery if and when further instructions were given by him: Rolle's Abridgment, Part II., p. 25, Title Faits. M.; *Murray* v. *Earl of Stair* (3); Sheppard's Touchstone, 8th ed., pp. 58—60; *Newton* v. *Metropolitan Ry. Co.* (4); *London Freehold and Leasehold Property Co.* v. *Baron Suffield* (5); *Bowker*

(1) (1599) 5 Rep. 84.
(2) (1791) 1 Ves. 272, 274.
(3) (1823) 2 B. & C. 82.
(4) (1861) 10 W. R. 102.
(5) [1897] 2 Ch. 608.

v. *Burdekin*. (1) The solicitors appear to have acted on the supposition that they had authority under the arrangement made with Mr. Hoe to complete the deed after his death, but upon his death any authority given by him to them would come to an end. The case cannot be put higher than that the document was delivered to be operative, either upon further instructions being given by Mr. Hoe, or, if he died without giving any further instructions, upon his death. He died without giving any further instructions. So the document would on this assumption stand on the footing that it was delivered to take effect upon his death. It is clear that such a document is testamentary, and this document, not being executed with the formalities required in the case of a will, is inoperative: *Habergham* v. *Vincent* (2); *In the Goods of Morgan*. (3) The fact that Mrs. Brown signed the deed of assignment does not shew that it was ever delivered by Mr. Hoe with the intention that it should be operative in præsenti. The proper inference from the circumstances is that she was informed as to what the intention of Mr. Hoe in going through the form of execution was, and signed it herself with a similar intention.

*Holman Gregory*, *K.C.*, and *G. W. Powers*, for the defendants. The deed of assignment on the face of it is unconditional, and appears to have been duly executed by both the parties to it; and therefore it must prima facie be deemed to have been operative to pass the property, and the onus lies on the plaintiffs of shewing beyond doubt that there was either no delivery of it at all, or that the delivery of it was conditional. Mrs. Brown executed the deed, presumably at or about the time when Mr. Hoe did so, and thereby prima facie rendered herself liable on the covenants of the lease, and so had given good consideration: *Price* v. *Jenkins*. (4) Under those circumstances, Mr. Hoe could not afterwards be heard to say that there never had been any delivery of the deed which was operative, or that it was revocable at his pleasure. Mr. Hoe having signed, sealed, and delivered the document with the knowledge that Mrs. Brown was about to sign it, from the moment when she signed, it

(1) (1843) 11 M. & W. 128, 147.
(2) (1793) 2 Ves. 204, 231.
(3) (1866) L. R. 1 P. & M. 214.
(4) (1877) 5 Ch. D. 619.

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became irrevocable. It is submitted that upon the facts it must be taken that there was an absolute delivery of the instrument as a deed; or, if not, that there was a conditional delivery of it as an escrow. Mr. Hoe's solicitors must be deemed to have held it in the character of strangers, holding it as between the parties to abide fulfilment of the condition, and not as agents for Mr. Hoe. It does not follow, because for some purposes they were acting as solicitors for Mr. Hoe, that they held this deed as his agents merely. The question whether a document is testamentary depends on intention, and on whether the instrument is revocable or not. If, as is contended, this instrument was irrevocable by Mr. Hoe, it cannot be regarded as a mere testamentary disposition; and, as events happened, on the death of Mr. Hoe without having given any instructions, and Mrs. Brown's surviving him, the condition was performed, and the deed became operative. [They also cited *Xenos* v. *Wickham* (1); *Hare* v. *Horton* (2); *Watkins* v. *Nash* (3); *Doe* d. *Garnons* v. *Knight* (4); *Perryman's Case* (5); *In the Goods of Slinn* (6); *Robertson* v. *Smith* (7); *In re Coles* (8); *Graham* v. *Graham* (9); *Copeland* v. *Stephens* (10); *Hooper* v. *Ramsbottom* (11); *Edmunds* v. *Edmunds*. (12)]

*Buckmaster, K.C.*, for the plaintiffs, in reply.

*Cur. adv. vult.*

April 11. VAUGHAN WILLIAMS L.J. This is an appeal from the judgment of Scrutton J. The judgment necessarily turns so much upon the construction of two letters of September 8 and 9, 1905, which were written to Mr. Hoe, who was the assignee of the lease of a house in Brunswick Square, that I think anything I have to say will seem clearer if I call attention in the first instance to the salient parts of those two letters. The first letter sets forth the proposals of the solicitors to their

(1) (1867) L. R. 2 H. L. 296, 323.
(2) (1833) 5 B. & Ad. 715.
(3) (1875) L. R. 20 Eq. 262.
(4) (1826) 5 B. & C. 671, 688, 689; 8 Dowl. & R. 348, 360, 361.
(5) 5 Rep. 84.
(6) (1890) 15 P. D. 156.
(7) (1870) L. R. 2 P. & M. 43.
(8) (1871) L. R. 2 P. & M. 362.
(9) 1 Ves. 272, 274.
(10) (1818) 1 B. & A. 593, 605.
(11) (1815) 6 Taunt. 12.
(12) [1904] P. 362.

client as to the various modes in which his desire to transfer the lease to Mrs. Brown could be carried out. They make several suggestions. It is not necessary that I should go through these suggestions one by one, but they are mutually exclusive of each other, and only one of them could be adopted. Now, when we come to the letter of September 9, which was a letter written after the deed had been proposed and adopted by Mr. Hoe, and signed, sealed, and, in a physical sense at all events, delivered by him, that letter sets forth what Messrs. Hopgoods & Dowson, who were the solicitors for Mr. Hoe, conceived had been done in respect of this transfer of this lease. The letter runs thus: "Dear Sir,—38, Brunswick Square: We acknowledge that you have to-day executed the assignment of your lease to Mrs. Brown as an escrow and that we are to retain it on your behalf until you send us instructions to complete the deed. In the event of your dying before the deed is completed, we understand that we are to consider the deed as having been completed before your death and to take what steps are necessary to vest the lease in Mrs. Brown should she wish it. In the event of Mrs. Brown dying before the assignment is completed you will of course send us further instructions as to what is to be done with the premises."

Two suggestions have been made about the deed, the effect of which we have now to consider. One is that the deed in question was what is called in law an escrow, that is a writing which is to take no immediate effect, but is only to come into operation upon the happening of some condition. The other suggestion is that there was no escrow, in fact that there was no delivery at all of this deed; that it was physically delivered by being handed over, after it had in form been executed by signing, sealing, and delivery, but handed over only to be kept by the agents, the solicitors, for Mr. Hoe, and to be dealt with as Mr. Hoe should direct. In that case there would be no delivery, and Mr. Hoe was in a position to say the next day to his solicitors "Give me that paper, which I executed by signing, sealing, and handing to you, back again; I propose to put it into the fire," and no one would have been able to say one word against his power to do that. I may at once say that I have come to the conclusion that

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this deed was not an escrow, but that it was, after the formal execution had been gone through, handed to Messrs. Hopgoods & Dowson, the solicitors, as custodians of something that they were to hold absolutely at the will of Mr. Hoe.

With regard to the question whether the deed may be treated as an escrow, there can be no doubt but that, in order to constitute the delivery of a writing as an escrow, it is not necessary that it should be done by express words, but you are to look at all the facts of the case attending the execution, to all that took place at the time, and to the result of the transaction; and, therefore, though in form there is an absolute delivery, if it can be reasonably inferred that the instrument was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow: see the judgment of Parke B. in *Bowker* v. *Burdekin*. (1) In the present case there are certainly facts, prima facie, which may lead to one of two alternative conclusions, either that there was no delivery of the writing at all to any one to hold for the purpose of delivery, or that, even if there was such a delivery, it was a delivery to Mr. Hopgood with the intention that he should hold the deed conditionally, and that such delivery was not intended to be a complete delivery until the happening or performance of the condition intended according to the evidence. These facts are as pointed out by Scrutton J., namely, that Mr. Hopgood was to retain the writing in the shape of a deed executed by Mr. Hoe on Mr. Hoe's behalf, until Mr. Hoe should send instructions to complete it, and, in the event of Mr. Hoe's dying before it was completed, take what steps might be necessary to vest the lease in Mrs. Brown, should she wish it, and that, in the event of Mrs. Brown dying before the assignment was completed, Mr. Hoe was to send further instructions. Those facts are, as the learned judge recognizes, strong objections to the contention that the writing executed by Mr. Hoe was executed by him as an escrow, and tend to the conclusion that the deed was only delivered to Mr. Hopgood to be held by him as a mere agent, and not as a stranger, in the sense in which that word is used in reference to

(1) 11 M. & W. 128, 147.

escrows, or in a sense antagonistic to the right of Mr. Hoe to revoke or recall his instructions to Mr. Hopgood.

Apart from the signing and sealing of the writing by Mrs. Brown, I think that the letters of Mr. Hopgood of September 8 and 9 make it clear that the intention of Mr. Hoe was that Mr. Hopgood should hold the document as his agent, and that he (Mr. Hoe) should have the power to instruct Mr. Hopgood to deal with the executed writing as he should think fit. This seems inconsistent with the document being an escrow. It is true that Mr. Hopgood's letter contemplates in terms that the executed writing in the form of a deed shall operate as an escrow. This has to be set against the facts which I have recounted, shewing that Mr. Hoe intended to reserve to himself powers inconsistent with the existence of an irrevocable deed subject to a condition inchoate and afterwards to be consummated. On the whole I have come to the conclusion that the reservation by Mr. Hoe of such powers must prevail in determining the character of the document, notwithstanding the mistaken user in Mr. Hopgood's letters of the word "escrow," unless indeed the execution by Mrs. Brown prevents this conclusion.

There is some difficulty about this. There is no direct evidence that Mrs. Brown knew the contents of Mr. Hopgood's letters to Mr. Hoe. She executed the deed, by signature, seal, and delivery, and thereby assented to the assignment to her of the lease with its burdens. The question arises whether it is possible to control as against Mrs. Brown this document, on its face an absolute assignment, and to convert it into either a conditional assignment to take effect upon the happening of a future condition, or a deed in respect of which the Court are entitled to say that, though a deed inter partes, with no condition and no limitation whatsoever appearing therein, yet it is by reason of communications that passed between Mr. Hoe and his solicitor to be treated, notwithstanding the execution of Mrs. Brown, as a deed which never was delivered at all. On the face of it the deed purports to be signed, sealed, and delivered, but these letters shew, and I think conclusively shew, that Mr. Hoe never intended to deliver that document in any such sense, and that he might say "I did not deliver that deed, it must be

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handed back to me, I used the formal words but I did nothing else excepting to go through those forms." I think, as I have said, that this deed was not an escrow, but merely a document given by Mr. Hoe to his agent, his solicitor, to hold till he received further instructions. But can any one say that this is so as against Mrs. Brown? Is not Mr. Hoe, and are not Mr. Hoe's executors, estopped from saying that there was no delivery of this deed, which is, as I have pointed out, on its face a deed of assignment without any conditions imposed upon it whatsoever? It is difficult to come to a conclusion that there was no delivery by Mr. Hoe as between himself and Mrs. Brown of a deed which at his request Mr. Hopgood got Mrs. Brown to execute, unless one comes to the conclusion that Mrs. Brown was, when she executed, aware of the substance of these letters. The question is whether there is sufficient evidence of such knowledge by Mrs. Brown; there is, I think, some evidence in the sense of inferences from admitted facts, and my brethren think that this evidence is sufficient, and I am not prepared to differ from them as to a mere question of fact when once I have come to the conclusion that there is some evidence. I think, therefore, that this appeal must be allowed.

I have only to add that had the deed been an escrow to take effect on the death of the grantor as mentioned in the letter of September 9, the objection taken by Mr. Buckmaster would have been fatal.

FARWELL L.J. read the following judgment:—In December, 1898, the plaintiffs demised 38, Brunswick Square to one Buckland for thirty years at a yearly rent, and subject to the usual covenants, including a covenant not to assign without written consent, and with the usual proviso for re-entry. In August, 1902, the term was duly assigned to one Annie Davison by Buckland, and on September 26, 1904, by Annie Davison to R. Hoe. On August 16, 1907, Hoe was party to a deed reciting that the term was vested in him, and granting him permission to make a doorway through into the house next door. On September 22, 1909, Hoe died, and the plaintiffs in this action now sue his executors for rent and other relief on the footing

that the residue of the term of thirty years was vested in Hoe at his death. The executors defend by setting up an assignment by Hoe dated in September, 1909, but signed on September 9, 1905; the execution of the deed is put in issue, and the defendants accordingly call the attesting witness to prove execution and delivery. The question, therefore, is a purely legal one, in whom is the term created by the lease now vested? The term can pass at law by deed only, and it is essential to the validity of the deed that it shall have been delivered. There are two sorts of delivery, and two only, known to the law, one absolute, and the other conditional, that is as an escrow to be the deed of the party when, and if, certain conditions are performed. If the deed operated as a complete delivery, cadit quæstio; if it did not, then it must be either an escrow or a nullity. The mode in which it in fact operated is a question of intention, primarily of the grantor, and secondarily of the grantee; nothing passes out of the grantor against his intention, and no one can be compelled to accept an assignment of any property, onerous or otherwise, without his consent. Now an escrow or script is not a deed at all; it is a document delivered upon a condition on the performance of which it will become a deed, and will take effect as from the delivery, but until such performance it conveys no estate at all. Thus in *Hooper* v. *Ramsbottom* (1) a vendor sold real property to A., received part of the purchase-money, and delivered a conveyance of the property as an escrow on condition of payment of the balance: the vendor then pawned the deeds; and it was held that the purchaser on payment of the balance of his purchase-money was entitled to the estate and the deeds free from the pawnbroker's claim: the pledge was perfectly good when made, but was defeated by the subsequent performance of the condition which threw the commencement of the purchaser's title back to the date of the original delivery of the escrow. The rules relating to escrows are thus stated by Preston in his book on Abstracts, 2nd ed., vol. 3, p. 65: "(1.) The writing will not operate as a deed till the second delivery: (2.) The party deputed to make the second delivery cannot give effect to the writing by delivering the same before the conditions are performed: (3.) On

(1) 6 Taunt. 12.

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the second delivery of the writing it will have relation, for the purposes of title, and not for the purpose of giving a right to intermediate rents, &c., from the delivery: (4.) So as the conditions be performed, and the deed delivered a second time, the deed will be good, notwithstanding the death of both or either of the parties before the second delivery"; and Sheppard's Touchstone, 8th ed., pp. 58—60, is to the same effect. The questions therefore are: Was the assignment by Hoe ever delivered by him as his act and deed; or as an escrow; or was there no valid delivery at all? The evidence of the solicitor called by the executors themselves in order to prove delivery of the deed on which they rely is clear: the whole object of the assignor was not to deliver the writing as his deed: the effect of the letters of September 8 and 9, 1905, confirmed by Hoe's letter of September 11, is plain and is corroborated by the considerations that an immediate assignment without licence would have operated as a forfeiture; that Hoe retained the title deeds, and his solicitors retained the assignment until Hoe's death; that Hoe paid the rent, rates, and taxes throughout, and that in the deed of 1907 he recited that the term was then vested in him. The only fact to set against this is the execution of the assignment by Mrs. Brown at some date unknown, but probably at or about the time when Hoe signed the document. This is, in my opinion, insufficient to counterbalance the other facts: her execution was probably intended to signify her consent to accept the assignment if and when the deed became operative, but the initial and essential step in the assignment of a legal interest is the act of the grantor taking the estate out of himself: without this nothing done by the grantee can vest that estate in him. Assuming that Mrs. Brown's execution was practically contemporaneous, it would be ineffectual to take anything out of the grantor; if it came later it might be evidence of the performance by her of a condition, if the deed were a true escrow; but on such evidence as exists in the present case it would be impossible to regard it as evidence of a fresh and absolute delivery of the deed by the grantor: there is no evidence whatever of any delivery by Hoe except that mentioned in the letter of September 9, 1905.

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Was the deed then delivered as an escrow, or was there no delivery at all? I doubt if a man, by executing a deed, and handing it over to his own solicitors to be held on his behalf until he gives them further instructions, makes a delivery of it as an escrow at all; I doubt also if a deed can be delivered as an escrow at all subject to an overriding power in the grantor to recall the deed altogether; but Hoe gave no such instructions; and I will deal with the contention that the condition was the death of Hoe. I am of opinion that this is not a good condition for an escrow: a deed of grant of the grantor's own property to take effect only on the death of the grantor is necessarily testamentary, and cannot be turned into a deed.

Mr. Preston's fourth rule, cited above, and the cases referred to in Sheppard's Touchstone merely state that a lawful condition of delivery is not rendered incapable of performance by the death of the grantor or grantee, or both; but they do not affirm that a man can execute a deed of grant of his own property to take effect only on his own death. It is well settled that such a disposal of property is testamentary only, and cannot operate as a deed at all, and it makes no difference that another condition is added, as, for example, in this case the survival of Mrs. Brown. The doubt expressed by Coleridge J. in the case of *Doe* d. *Lloyd* v. *Bennett* (1) is, in my opinion, well founded. He says: "I am of opinion that the delivery had been completed. However, I doubt much whether, if the instrument had been delivered on condition that the grantee should not have it till the grantor's death, it could operate as an escrow." The law is stated by Buller J. in the case of *Habergham* v. *Vincent* (2) thus: "But those cases have established that an instrument in any form, whether a deed poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law and in equity; and in one of them there were express words of immediate grant, and a consideration to support it as a grant; but as upon the whole the intention was that it should have a future operation after death it was considered as a will." This rule has been acted upon consistently ever since. One of

(1) (1837) 8 C. & P. 124, at p. 125. (2) 2 Ves. 204, at p. 231.

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the last cases is *In the Goods of Morgan* (1), a case in which the deed expressed in terms the same condition or provision as is set up here. In that case Samuel Morgan, on February 12, 1866, executed, in the presence of two witnesses, three deeds of gift in favour of his three children respectively. By these deeds he conveyed his property to trustees for the benefit of his children, but all of them contained clauses directing that the conveyances were not to take effect until after his decease. The President said: "These three deeds of gift were intended to operate after the death, and not until then, and they fall within that principle," namely, the principle laid down in a case which he had already referred to. If effect could be given to such a transaction as the present an easy way of defeating the provisions and safeguards of the Wills Act and evading death duties has been found.

I am therefore of opinion that the document in question was not in the event which has happened capable of taking effect as an escrow, and has not taken effect as a deed, and that this appeal should be allowed, and judgment entered for the plaintiffs.

KENNEDY L.J. read the following judgment:—The question raised for judicial decision by this rather curious case is whether the lease which was assigned to Robert Hoe by one Annie Davison on September 26, 1904, had or had not been validly and effectually assigned by Robert Hoe to Mrs. Brown by a document described in the statement of defence as "an indenture dated the 20th September, 1909," some time before the commencement of this action on August 18, 1910.

Robert Hoe died on September 22, 1909, and the plaintiffs, the lessors, have made claims in the action against the defendants as executors of his will and codicil for recovery of possession of the demised premises, and for half a year's rent due June 24, 1910, and mesne profits, according to the terms of the lease. Have the defendants proved that there was a transaction whereby the interest in the term was divested from Robert Hoe, and vested in Mrs. Brown, so that the legal estate never passed to

(1) L. R. 1 P. & M. 214.

the defendants as Robert Hoe's executors? The answer to this question depends upon the operative value of the document described as the indenture dated September 20, 1909. Did that document ever become operative by delivery either as a deed to have a present and binding effect as such, or as an escrow, that is, as a document to take effect as a deed upon the happening of some event or upon the fulfilment of some condition?

In considering these questions the Court has to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction, according to the language of Parke B. in *Bowker* v. *Burdekin*. (1)

I am satisfied in the present case that the true inference from the undisputed facts, the letters of September 8 and 9, 1905, the continuance of the user of the premises by Robert Hoe, and his application as tenant for a licence to make structural alterations, is that Robert Hoe never intended to make a delivery of this document as a deed to take effect instanter. The mere fact that Mrs. Brown at or about the same time executed the document is insufficient to disturb this inference. I think that it cannot be taken to mean more than that she acquiesced in the arrangement, whatever it might be, which was intended by Mr. Robert Hoe. I may add that, as a matter of fact, it seems to me extremely unlikely that Mr. Hopgood, who had received the instructions, would have allowed her to execute it without telling her what that intention, which we know, was.

I am satisfied also that the defendants are not entitled to rely upon the delivery of the document as an escrow. I doubt whether there was any "delivery" of this deed in the legal sense of that word. According to the letters of September it was to be retained on behalf of Mr. Robert Hoe until Mr. Hopgood should have instructions to complete it. On the death of Robert Hoe the solicitor was to take whatever steps might be necessary to vest the lease in Mrs. Brown, if she should wish it.

Putting aside, however, the doubts arising from these considerations as affecting delivery, I am of opinion that the

(1) 11 M. & W. 128, 147.

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mere fact that the condition, upon which the deed, if an escrow, was to take effect, was the death of Robert Hoe, the grantor, is in itself sufficient to prevent the defendants from successfully relying upon the delivery of this deed as an escrow which becomes effectual upon the fulfilment of a condition. It is an attempt by means of the deed to make in regard to the property or interest dealt with by the deed a testamentary disposition which is not attested in the way provided by the Wills Act, and which our law treats as a nullity. This, as it seems to me, fatal point was not overlooked by Scrutton J., but, as I understand his judgment, he thought that this difficulty, as well as a difficulty raised by the plaintiffs' counsel as to Hopgood's capacity to act after his client's decease, was met by judicial authority to be found in *Perryman's Case* (1) and *Graham* v. *Graham*. (2) In my opinion neither of these authorities is really in point. All that they decide is that, if a writing is delivered by a man as an escrow to be his deed on the happening of a certain condition, the fact that the death either of the grantor or the grantee intervenes between the delivery of the writing and the fulfilment of the condition does not prevent the deed taking effect according to its tenor upon the subsequent happening of the condition; and that the same principle governs the case of a bond delivered by a feme sole as an escrow, where her marriage intervenes between such delivery and the performance of the condition. These decisions do not, in my view, touch the defendants' difficulty here, which is that the very condition or contingency itself, upon which the deed according to the theory now under consideration is to become effective, is the decease of the grantor, and "the obvious purpose," to quote the words of Buller J. in *Habergham* v. *Vincent* (3), of the instrument was "not to take place until after the death of the person making it," in which case, as the learned judge said, it is established that the instrument shall operate as a will. See also the case referred to by Farwell L.J., *In the Goods of Morgan*. (4) The fact that in the present case the condition was, in a sense, a double condition, namely, the

(1) 5 Rep. 84.
(2) 1 Ves. 272, 274.
(3) 2 Ves. 231.
(4) L. R. 1 P. & M. 214.

grantor's death and the survivorship of the grantee, does not appear to me to make any difference in point of law.

In my opinion this appeal ought to be allowed.

*Appeal allowed.*

Solicitors for plaintiffs: *Long & Gardiner.*

Solicitors for defendants: *Smith, Rundell & Dods.*

E. L.

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DODD, APPELLANT *v.* PEARSON, RESPONDENT.

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*April 4.*

*Local Government—Offence—Unsound Meat—Prosecution by Superintendent of Police—Proceeding for Recovery of Penalty—Necessity for Attorney-General's Consent—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 253.

By s. 116 of the Public Health Act, 1875, any medical officer of health or inspector of nuisances may inspect any meat, &c., exposed for sale or deposited in any place for the purpose of sale or of preparation for sale, and intended for the food of man, and if it appears to him to be diseased or unsound he may seize it and carry it before a justice; and by s. 117, if it appears to the justice to be diseased or unsound he shall condemn it and order it to be destroyed, and the person to whom the same belongs or in whose possession it was found shall be liable to a penalty or, at the discretion of the justice, to imprisonment; and the justice who, under the section, is empowered to convict the offender may be either the justice who has ordered the article to be destroyed, or any other justice having jurisdiction in the place. By s. 251, all offences under the Act and all penalties directed to be recovered in a summary manner, or the recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts before a Court of summary jurisdiction, constituted of two or more justices; and by s. 253, "proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General":—

*Held*, that a prosecution under s. 117 is a proceeding to recover a penalty within the meaning of s. 253, and therefore the consent in writing of the Attorney-General is necessary where the prosecution is

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instituted by a person other than a party aggrieved or the local authority, there being no express provision in s. 117 authorizing any person other than the above to prosecute.

CASE stated by justices of Cheshire.

An information was laid against the appellant, who was a cattle dealer and butcher, by the respondent, a superintendent of police, under s. 117 of the Public Health Act, 1875, and a summons was issued thereon, charging that he on September 19, 1910, unlawfully did have in his possession a carcase of a cow which then belonged to him, deposited in his slaughterhouse for the purpose of preparation for sale and intended for the food of man, which said carcase was then diseased, unwholesome, and unfit for the food of man, and was on September 19, 1910, seized by the medical officer of health and condemned by a justice of the peace and ordered to be destroyed.

It appeared in evidence that on September 18, 1910, at 1.40 A.M., a police constable named Jones, with another constable, entered the appellant's slaughterhouse and found the said carcase cut up and dressed as if for the food of man. On September 19 Jones called in the medical officer of health, and it appeared to the latter that the carcase was diseased, unwholesome, and unfit for the food of man. The medical officer therefore seized it, and later in the same day it was condemned by a justice of the peace and ordered to be destroyed.

The appellant was not present when the carcase was first found upon his premises, but as soon as his attention was called to it he stated that it was not intended for the food of man; that he had discovered its condition after it was cut up and dressed, and had given orders upon September 16 that it should be boiled and used to feed his pigs, of which he kept several.

On October 1 the medical officer of health reported the facts to the Nantwich Rural District Council, who were the sanitary authority, and the council, after discussing and considering the matter, decided by a majority not to prosecute the appellant upon the ground that the carcase was not intended for the food of man. The respondent thereupon, on October 14, laid an information as above mentioned before a justice of the peace,

who issued his summons to the appellant to appear and answer the information.

It was not denied on behalf of the appellant that the carcase was diseased, unwholesome, and unfit for the food of man, and evidence was called on behalf both of the prosecution and of the defence upon the question whether it was intended for the food of man. The justices came to the conclusion that the carcase was diseased, that it was prepared and dressed in the usual way that carcases were prepared for human consumption, and was deposited in a place where carcases were placed which were intended for human consumption, and was destroyed by order of a justice acting on the advice of the medical officer of health for the district, and that it was intended for the food of man.

It was contended on behalf of the appellant that the respondent was not a party aggrieved, and that therefore by s. 253 of the Public Health Act, 1875 (1), the summons had been issued without jurisdiction, and that the justices had no jurisdiction to convict the appellant. *Fletcher* v. *Hudson* (2) was cited in support of this contention.

It was admitted on behalf of the respondent that he had not the authority of the local authority to take the proceedings, nor the consent of the Attorney-General, but it was contended on his behalf that, inasmuch as he was a superintendent of police responsible for the protection of the public in the district from infringement of the law, he was a party aggrieved within the meaning of s. 253, and that there was nothing in the language of s. 117 to prevent any one taking proceedings. *Giebler* v. *Manning* (3) was cited in support of this contention.

The justices were of opinion that the contention on behalf of the respondent was correct, and that upon the authority of *Giebler* v. *Manning* (3) the respondent could take proceedings

(1) 38 & 39 Vict. c. 55, s. 253: "Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General . . . ."

(2) (1880) 5 Ex. D. 287.

(3) [1906] 1 K. B. 709.

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without the authority of the district council or the consent of the Attorney-General. They accordingly convicted the appellant, and ordered him to pay a penalty of 20*l.* and 9*l.* 13*s.* for costs.

The question for the opinion of the Court was whether the decision was right in law, and whether the justices had jurisdiction to convict the appellant.

*Leycester*, for the appellant. The respondent cannot, by reason of the provisions of s. 253 of the Public Health Act, 1875, take proceedings to recover a penalty under s. 117 without the consent in writing of the Attorney-General. Sect. 253 applies to all proceedings for the recovery of penalties under the Act unless there is some express provision to the contrary. There is no express provision in s. 117 giving a police constable or any other person power to take proceedings for the recovery of a penalty under that section, and therefore s. 253 applies. That being so, the only persons who can take proceedings are either a party aggrieved, or the local authority of the district, or some other person with the consent in writing of the Attorney-General. The superintendent of police is not a party aggrieved.

[*Cecil Walsh*, for the respondent, said that he would not contend that the superintendent of police was a party aggrieved.]

The local authority have refused to prosecute, and as the superintendent of police has not obtained the consent in writing of the Attorney-General, he is not entitled to institute these proceedings. If the local authority neglect to perform their duty under s. 117 the superintendent may bring the matter before the Attorney-General, who will consider it and decide whether to give his consent to the superintendent taking proceedings under that section, just as under s. 106, if the local authority make default in doing their duty in relation to nuisances, the Local Government Board may authorize any officer of police to institute the necessary proceedings. In *Fletcher* v. *Hudson* (1) it was held that there was an express provision in Sched. II., r. 70 (now repealed by the Local Government Act, 1894), of the Public Health Act, 1875, authorizing

(1) 5 Ex. D. 287.

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"any person" to sue for a penalty under that rule, and that therefore s. 253 did not apply. There is no such express provision in s. 117. The decision in *Gicbler* v. *Manning* (1), upon which the justices relied, that a private person can prosecute for an offence under s. 47, sub-s. 2, of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76)—which is a similar enactment to that contained in s. 117 of the Public Health Act, 1875—is not applicable because there is no section in the London Act corresponding with s. 253 of the Act of 1875. *Jobson* v. *Henderson* (2) is not against the appellant's contention, because there the prosecution was under a section of the Town Police Clauses Act, 1847, which by s. 171 of the Public Health Act, 1875, is incorporated in the latter Act, and the Court held that s. 253 of the Act of 1875 did not apply to such a prosecution. The justices in the present case ought to have dismissed the information.

*Cecil Walsh*, for the respondent. The question is whether a prosecution under s. 117 of the Public Health Act, 1875, comes within s. 253 so as to prevent any one, except a party aggrieved or the local authority, from taking proceedings unless he has the consent in writing of the Attorney-General. It is submitted that it does not. In the first place a prosecution under s. 117 is not a proceeding for the recovery of a penalty within the meaning of s. 253. It is a proceeding for the punishment of an offender, who has committed a criminal offence, by fine or imprisonment at the discretion of the justice. Sect. 253 applies to proceedings for the recovery of a penalty in respect of an act which does not amount to a criminal offence in the ordinary sense, and where a penalty alone is inflicted, as, for instance, for breach of a by-law. Under s. 117 the proceedings may not result in the recovery of a penalty at all, as the offender may be sent to prison. The section speaks of him as "the offender," and gives a justice power to "convict" him. There are many sections in Part III. of the Act, dealing with sanitary provisions, where a penalty and not imprisonment is imposed for breach of its provisions, and s. 253 applies to those matters.

Even if a prosecution under s. 117 is a proceeding for the

(1) [1906] 1 K. B. 709. (2) (1900) 82 L. T. 260.

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recovery of a penalty within s. 253, still the provisions of s. 253 are not applicable thereto because of the words "except as in this Act is expressly provided." Sects. 116 and 117 form a special code dealing with unsound meat and other articles intended for the food of man and containing very stringent provisions. Under those sections a person's property may, without any notice to him, be seized and taken before a justice and condemned: *White* v. *Redfern* (1); and by the last clause in s. 117 one justice may convict the offender and impose a penalty, whereas s. 251 contains a general provision that all offences and all penalties under the Act may be prosecuted and recovered before a Court of summary jurisdiction which shall be constituted of two or more justices. The procedure under s. 117 is a special procedure for a special state of circumstances which demand urgency. Supposing that the justice who condemns the meat directs the medical officer of health or the inspector of nuisances who brings the unsound meat before him to take out a summons under s. 117, it would be extraordinary if that person could not do so without first applying to the local authority or obtaining the consent of the Attorney-General. The provisions of ss. 116 and 117 come within the exception in s. 253, "except as in this Act is expressly provided," and therefore any one may prosecute: *Giebler* v. *Manning* (2); and this is the view taken by the editors of the seventh edition of Lumley's Public Health Acts, p. 226. The decision of the justices was right.

*Leycester* was not called upon to reply.

LORD ALVERSTONE C.J. The question which we have to determine is whether the provisions of s. 253 of the Public Health Act, 1875, as to the persons who may take proceedings for the recovery of a penalty under the Act apply to a prosecution under s. 117. I should have been glad to have been able to adopt the contention urged on behalf of the respondent, because such a construction would probably produce very beneficial results. I am, however, unable to do so. The provisions of ss. 116 and 117 are highly penal. Meat exposed for

(1) (1879) 5 Q. B. D. 15. (2) [1906] 1 K. B. 709.

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sale or deposited in any place for the purpose of sale, and intended for the food of man, if it appears to be unsound, may be seized by a medical officer of health or inspector of nuisances and taken before a justice, who, if he is of opinion that the meat is unsound, shall condemn it and order it to be destroyed; and all this may be done without notice to the owner of the meat, and without proof that he knew it to be unsound; and the owner may be liable to a penalty or to imprisonment.

The facts in the present case are that a police constable called the attention of the medical officer of health to the carcase of a cow which was in the appellant's slaughterhouse, and the medical officer, being of opinion that it was diseased and unfit for the food of man, took it before a justice who condemned it and ordered it to be destroyed. The local authority having decided not to prosecute the appellant, the superintendent of police laid an information against him under s. 117 of the Act without having obtained the consent of the Attorney-General. The question is whether s. 253 applies to such a prosecution. That section provides that "proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General"; and then follows a proviso which is not material in this case. Therefore two persons only have an unqualified right to institute proceedings to recover a penalty under the Act, namely, a party aggrieved and the local authority, and in addition any one may institute such proceedings if he obtains the consent in writing of the Attorney-General. In the circumstances of this case there could be no party aggrieved, because the carcase was destroyed before it was sold and passed out of the appellant's possession, and that may have somewhat influenced the local authority when they refused to prosecute the appellant. The fact that the local authority have power to institute proceedings shews that the Legislature entrusts to them as a public body the duty of saying whether the offence is of such a nature that it ought to render the offender liable to a penalty. The first

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question which we have to decide is whether the proceedings before the justices were proceedings for the recovery of a penalty under the Act. It seems to me that they were. Sect. 117 in express words states that the offender "shall be liable to a penalty not exceeding twenty pounds." Therefore s. 253 prima facie applies to this case, unless it can be said that s. 117 is taken out of the operation of s. 253 by reason of the words "except as in this Act is expressly provided." I cannot find any express provision in s. 117 which authorizes a person other than those specified in s. 253 to take proceedings. As was pointed out in *Fletcher* v. *Hudson* (1), there are other sections in the Act in which "any person," without any qualification, is empowered to take proceedings. In that case Bramwell L.J. said (2) that "the words 'except as in this Act is expressly provided' must mean 'except where there is an express provision that some person may sue who is neither a party aggrieved, nor a local authority, nor a person acting with the consent in writing of the Attorney-General.' In other words, s. 253 may be read thus: proceedings may be taken by a party aggrieved, they may be taken by a local authority, they may be taken by a person who has the consent of the Attorney-General, and lastly they may be taken by any person who, not being one of the preceding, is expressly authorized to do so." Sect. 117 contains no such express provision authorizing "any person" to take proceedings, and therefore these proceedings were instituted by a person who was not expressly authorized to do so. The appeal must therefore be allowed.

BRAY and BANKES JJ. agreed.

*Appeal allowed.*

Solicitor for appellant: *J. M. Voss, for J. P. Whittingham, Nantwich.*

Solicitors for respondent: *Philpot & Co., for Potts, Potts & Gardner, Chester.*

(1) 5 Ex. D. 287. (2) Ibid. at p. 290.

W. F. B.

SALT, Appellant *v.* TOMLINSON, Respondent.

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*April* 26.

*Local Government—Offences—Diseased Meat—Sale—Seizure when in Possession of Purchaser—Condemnation—Liability of Seller to Penalty—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 28.

The appellant sold at her shop to a customer a piece of meat for human food. The meat was unsound and unfit for food at the time of sale. The customer took the meat away with her. On the following day it was seized at the customer's house by an inspector of nuisances. The meat was subsequently condemned by a justice:—

*Held*, that, although the meat had not been seized while on the appellant's premises, the appellant was liable to be convicted of an offence in respect of the sale of the meat under s. 117 of the Public Health Act, 1875, as amended by s. 28 of the Public Health Acts Amendment Act, 1890.

Case stated by justices of Derbyshire.

At a petty sessions held in and for the division of Long Eaton in the said county on November 1, 1910, an information was preferred by John Tomlinson, inspector of nuisances for the Long Eaton Urban District Council (hereinafter called the respondent), against Eliza Salt, of 25, Sawley Road, Long Eaton (hereinafter called the appellant), under s. 117 of the Public Health Act, 1875 (1), charging that one piece of veal, to wit,

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 116: "Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any . . . . meat . . . . exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such . . . . meat . . . . appears to such medical officer or inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice."

Sect. 117: If it appears to the justice that any . . . . meat . . . . so seized is diseased or unsound or unwholesome or unfit for the food of man he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every

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fillet, sold for the food of man on October 8, 1910, was on October 9, 1910, lawfully seized by the respondent, it then appearing to the respondent to be unsound and unwholesome and unfit for the food of man, and that the said piece of veal was afterwards, on October 10, 1910, in due course of law adjudged by a justice of the peace to be unsound and unfit for the food of man and condemned and ordered by him to be destroyed or so to be disposed of as to prevent it from being used for the food of man, and that the appellant was the person to whom the meat belonged at the time the meat was so sold contrary to the form of the statute in such case made and provided.

Upon the hearing of the information the following facts were proved or admitted:—About 8 P.M. on October 8, 1910, one Selina Kershaw, residing at Long Eaton, purchased from the appellant at her shop at 25, Sawley Road, Long Eaton, a piece of veal weighing three pounds or thereabouts for the sum of 2*s*.

On October 9, 1910, Kershaw began to cook the piece of veal for dinner; while she was cooking it, she came to the conclusion that the veal was not in proper condition. Thereupon Kershaw took the partly cooked veal to the medical officer of health, Dr. A. B. Chambers, who formed the opinion that it was unfit for food. Dr. Chambers sent for the respondent. On his arrival at 3.30 P.M. on the same day the respondent inspected the veal, and, being of opinion that it was unsound and unfit for food, thereupon seized it and carried it away.

On October 10, 1910, the veal was condemned by a justice of

. . . . piece of meat . . . . so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months."

Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 28:

"(1.) Sections 116 to 119 of the Public Health Act, 1875 (relating to unsound meat), shall extend and apply to all articles intended for the food of man, sold or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale within the district of any local authority.

"(2.) A justice may condemn any such article, and order it to be destroyed or disposed of, as mentioned in section 117 of the Public Health Act, 1875, if satisfied on complaint being made to him that such article is diseased, unsound, unwholesome, or unfit for the food of man, although the same has not been seized as mentioned in s. 116 of the said Act."

the peace and ordered to be destroyed; and it was in fact accordingly destroyed. The veal was in fact unsound and unfit for the food of man at the time of its sale to Kershaw and its seizure by the respondent.

On behalf of the appellant it was contended: (*a*) That upon the above facts there was no seizure of the veal when exposed for sale or deposited in any place for the purpose of sale or of preparation for sale as mentioned in s. 116 of the Public Health Act, 1875, and that, therefore, no offence under s. 117 of the Act had been committed, and that the provision of s. 28 of the Public Health Acts Amendment Act, 1890, which had been duly adopted and was in force in the urban district of Long Eaton, did not affect the matter; (*b*) that a seizure of the veal when the same was not the property or in the possession of the appellant or in her premises, but after the sale by her and when in the possession of Kershaw, was not a seizure within the meaning of ss. 116 and 117, and that, therefore, no offence under s. 117 had been committed by the appellant notwithstanding the provisions of s. 28 of the Act of 1890; (*c*.) that the veal did not belong to the appellant nor was it found in her possession or on her premises within the meaning of s. 117.

The justices were of opinion that the above facts constituted an offence by the appellant under s. 117 of the Public Health Act, 1875, as amended by s. 28 of the Act of 1890, and they accordingly convicted the appellant.

The question of law for the opinion of the Court was whether upon the facts the appellant could be properly convicted.

*McCardie*, for the appellant. On the facts proved no offence was committed. At the time of the seizure the meat was not in the possession of the appellant, and, therefore, there was not a seizure of meat "exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale" by the appellant within the meaning of s. 116 of the Public Health Act, 1875. That being so, *Vinter* v. *Hind* (1) is a conclusive authority that the appellant was not liable to a penalty under s. 117; for it was held in that case that the two sections must be read together,

(1) (1882) 10 Q. B. D. 63.

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and that a person can only be convicted under s. 117 in respect of meat which has been seized in accordance with s. 116. The effect of those two sections has not been altered in this respect by s. 28 of the Act of 1890. That section by sub-s. 1 extends the operation of ss. 116 and 117 to all articles of food, and by sub-s. 2 enables a justice to condemn meat although it has not been seized as mentioned in s. 116. But s. 28 does not authorize a conviction after condemnation merely. There still must first be a seizure under s. 116 of meat exposed for sale; and, therefore, it was held in *Firth* v. *McPhail* (1) that a person who deposited on premises other than his own diseased meat intended for food had not committed an offence under s. 117 as amended by s. 28 of the Act of 1890. The word "sold" was introduced into sub-s. 1 of s. 28 in order to meet the case of diseased meat which had in fact been sold but which was still on the vendor's premises. Sect. 47, sub-s. 3, of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), contains express words dealing with a case like the present, for it provides that where unsound meat is found in the possession of any person the seller of it to that person may in certain circumstances be convicted. The absence of any similar provision from s. 28 of the Act of 1890 shews that that section as it stands cannot have the effect of enlarging s. 117 in the manner contended for by the respondent so as to cover this case. [He referred to *Billing* v. *Prebble*. (2)]

*Disturnal*, for the respondent. The conviction was right. The object of s. 28 of the Act of 1890 was to get rid of the difficulty which arose in *Vinter* v. *Hind* (3), and that object was achieved by the introduction of the word "sold" into s. 28, thus making ss. 116 and 117 of the Act of 1875 apply to all articles of food intended for the food of man whether actually sold or only exposed for sale. Then by sub-s. 2 of s. 28 an article of food which is diseased may be condemned although it has not been seized, thus eliminating the words "so seized" from s. 117. The result is that where there is a sale followed by condemnation the seller can now be convicted under s. 117.

*McCardie* replied.

(1) [1905] 2 K. B. 300. (2) (1896) 61 J. P. 86.
(3) 10 Q. B. D. 63.

LORD ALVERSTONE C.J. Personally I have no doubt whatever that the appellant was rightly convicted, but in these cases which sometimes involve difficult questions one must be careful to see what are the exact facts. In the present case it has been found as a fact that the meat was unsound and unfit for the food of man at the time it was sold by the appellant. That finding of fact gets rid of the difficulty which arose in *Vinter* v. *Hind* (1), where it was pointed out by Field J. that a considerable time had elapsed between the exposure of the meat for sale and its examination by the inspector, and that there was no finding of fact that at the time of the exposure for sale the meat was unsound. The meat in question in this case was subsequently to its sale by the appellant seized by an inspector while in the possession of the purchaser, and was afterwards condemned. If the question of the appellant's liability to a penalty rested solely on the provisions of ss. 116 and 117 of the Public Health Act, 1875, there would have been good ground for the contention that in order to convict the appellant there must have been not only a seizure of the meat, but a seizure of it when exposed for sale on the appellant's premises. But ss. 116 and 117 must now be considered in the light of the alteration introduced by s. 28 of the Act of 1890. By sub-s. 1 of that section it is enacted that ss. 116 and 117 shall "extend and apply to articles intended for the food of man sold or exposed for sale." It is said for the appellant that the word "sold" applies only to an article of food which has in fact been sold but which at the time of seizure is still on the seller's premises. That is not to my mind a satisfactory argument, and I can see no reason for giving such a limited application as that to the word "sold." In my opinion the word equally applies to the case of an article which has been sold and which has passed out of the seller's possession, and the importance of the use of the word "sold" in sub-s. 1 of s. 28 is that it shews s. 28 contemplated cases to which ss. 116 and 117 were to apply in which there had not been a seizure at the place of sale. Then sub-s. 2 provides

(1) 10 Q. B. D. 63.

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that an article of food may be condemned and destroyed although it has not been seized as mentioned in s. 116.

The question which we have to decide in this case is whether the seller of meat which was unsound at the time of the sale and which was subsequently condemned can be held liable to a penalty under s. 117 although the meat has not been seized while in the possession of the seller. In my opinion, having regard to the object of this legislation, and to the language used in the amending section, s. 28 of the Act of 1890, the intention of the Legislature was to enlarge the class of cases which may be the subject of proceedings for the recovery of a penalty, and we cannot give effect to the narrower construction of s. 28 contended for, namely, that it is still a condition precedent to a conviction that there should have been a seizure of the meat while on the seller's premises. Where unsound meat is sold and taken away by the purchaser and is afterwards condemned, the seller may now be held liable to a penalty under s. 117. For these reasons I am of opinion that the appellant was rightly convicted, and this appeal must, therefore, be dismissed.

PICKFORD J. I have had considerable doubt in this case, and I cannot say that my doubts have been entirely removed, but on the whole I agree that the appeal must be dismissed. Sect. 116 of the Public Health Act, 1875, provides in substance that if diseased meat is exposed for sale it may be seized by an inspector of nuisances; and by s. 117 the meat "so seized" may be condemned by a justice, and the person to whom "the same" belonged at the time of the exposure for sale is made liable to a penalty or imprisonment. It was decided in *Vinter* v. *Hind* (1) that seizure on the premises of the person charged was a condition precedent to both condemnation and conviction, and if this case depended solely on those two sections *Vinter* v. *Hind* (1) would be an authority in favour of the appellant. But ss. 116 and 117 have been amended by s. 28 of the Act of 1890, sub-s. 1 of which extends the application of those sections to all articles intended for human food, and also makes them applicable to

(1) 10 Q. B. D. 63.

articles "sold" as well as to articles exposed for sale; and by sub-s. 2 a justice may condemn an article of food although it has not been seized as mentioned in s. 116. It is clear, therefore, that so far as condemnation is concerned the condition precedent of seizure is abolished. It would have been more satisfactory, to my mind, if the condition precedent of seizure had also been expressly abolished in the case of proceedings for a penalty. However, that has not been done, and the question is whether the section by necessary implication makes seizure at the premises of the person charged no longer a necessary preliminary to a conviction. I think it is clear that the effect of sub-s. 2 of s. 28 is to remove the words "so seized" from the earlier part of s. 117, which deals with condemnation, and to make that part of the section apply to diseased meat which has been sold or exposed for sale, although it has not been seized; and if the words "so seized" are removed from the earlier part of s. 117, then, when one comes to the later part of the section which provides for the liability to a penalty, the words "to whom the same belongs" can no longer be read as referring solely to meat which has been seized. If the section can be read in that way, it is, I think, possible to apply the penalty provisions of s. 117 to a case where unsound meat has been sold and condemned though no seizure has taken place on the defendant's premises. I think that it is possible to read s. 117 in that way, and it is certainly beneficial to the public to do so. I, therefore, agree, though with some doubt, that the appellant was rightly convicted.

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LUSH J. Under s. 117 two steps were necessary before a penalty could be recovered. There must have been a seizure of meat exposed for sale, and a condemnation of the meat "so seized." It was held in *Vinter* v. *Hind* (1) that when meat had been sold and taken home by the purchaser, by whom it was afterwards handed over to the inspector, it had not been "so seized" as prescribed by ss. 116 and 117, and that the seller, therefore, could not be convicted. Sub-s. 2 of s. 28 of the Act of 1890 does away with the necessity for seizure before

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condemnation in the case of "any such article." Those words refer one back to the words "all articles intended for the food of man sold or exposed for sale" in sub-s. 1. The result is that, if an article of food is sold in an unsound condition and is subsequently condemned, it is not necessary, in order to render the seller liable to the penalty imposed by s. 117, that there should have been a seizure of the meat at the seller's premises. I agree, therefore, that this appeal fails.

*Appeal dismissed.*

Solicitors for appellant: *Hamlin, Grammer & Hamlin, for B. W. Moore, Derby.*

Solicitors for respondent: *J. H. Lee & Watts, for S. Williams, Long Eaton.*

F. O. R.

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K. B. D. 1911 *Jan.* 24, 25, 30. C. A. *May* 25.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

## HUTCHINS BROTHERS *v.* ROYAL EXCHANGE ASSURANCE CORPORATION.

*Insurance (Marine)—Ship—Damage to Hull—Latent Defect in Stern Frame—Cost of replacing defective Stern Frame.*

A policy of insurance on a ship for twelve months from December 10, 1908, covering the ordinary perils insured against by a Lloyd's policy, provided that the insurance should also cover loss of or damage to the hull through any latent defect in the hull. In 1906, when the ship was built, the builders put into her a stern frame, supplied by a foreign firm, which contained a latent defect that was not discoverable by reasonable inspection until, during the currency of the policy, it became visible owing to the ordinary wear and tear of the ship. The stern frame was in consequence condemned:—

*Held*, that the cost of a new stern frame was not recoverable under the policy.

ACTION in the commercial list tried by Scrutton J. without a jury.

The plaintiffs, who were the owners of the steamship *Ellaline*, sought to recover, as a loss under a policy of marine insurance,

the expense incurred by them in replacing a stern frame which had been condemned.

The facts were stated by the learned judge in his considered judgment as follows :—" The claim was made under a policy dated December 10, 1908, insuring the plaintiffs in respect of the *Ellaline*, subject to the Institute Time Clauses as attached, for twelve months, from noon, December 8, 1908, to noon, December 8, 1909, against the ordinary Lloyd's perils. The Institute Time Clauses included a clause known as the 'Inchmaree Clause,' which runs as follows :—'This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.' The directly relevant words for the purposes of the present case are, 'This insurance also specially to cover . . . . loss of or damage to hull . . . . through any latent defect in the . . . . hull.' The defendants alleged there was no loss by perils insured against within the period of the policy. I find the facts to be as follows :—The *Ellaline* was built in 1906 by Messrs. Redhead in the north of England. They obtained the casting of her stern frame from the Skoda Pilsen works, a well-known Continental firm. When stern frames are cast in a mould, the metal shrinks in cooling. To make good the shrinkage, headers, or receptacles opening into the mould, are kept full of heated metal, which, as the metal in the mould contracts, runs down into the mould and fills it. As the metal round the edge of the header cools quicker than the centre, a sort of pit or hollow is formed in the header, as the metal sinks. Should enough metal not be placed in the header, this pit or hollow may extend down into the casting in the mould. As it will be some twenty minutes after the mould is filled before this sinking due to cooling is observed, if the depression is then filled

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with a heated metal, it will be of a different charge to the original mould, and probably of different composition; and it may or may not unite perfectly with the original metal. Further, these headers are placed at the thickest parts of the mould; the narrowest parts cool first; and two cooling narrow parts, one on each side of the thick part beneath the header, may exercise in contracting a pull or strain on the warmer part in the middle, and may cause a cooling crack there, which, according to the evidence, has marked characteristics, differing from those of a crack caused by violence to a cold and finished stern frame. After considering the evidence I find as facts that at Skoda, in casting this stern frame, owing to the sinking of the metal in the header and mould, a V-shaped wedge of metal of different composition from the original mould was run in. This wedge substantially united with the old metal; I am not certain that it completely united at all points where it touched the old metal. But in this V-shaped wedge a cooling crack took place, shewing on the surface of the stern frame.

"Some of the witnesses think the crack was confined to the V-shaped wedge; I am not satisfied as to this, and am disposed to think it spread into the original material. But it shewed markedly on the surface; and the Skoda people filled it up with metal, welded by some heating process, and covered it with some steel wash. In this condition the stern frame was passed by Lloyd's surveyor at Skoda, who did not discover the concealed defect. It was sent to Redheads, and neither their officials nor Lloyd's surveyors, who classed the ship, discovered the defect; nor did any of the plaintiffs know anything about it.

"The ship went to sea and suffered a series of minor damages. After stranding in January, 1907, and encountering ice in February, 1907, when rivets in the stern frame were started, she was examined in April, 1907, by Lloyd's and the underwriters' surveyors, but nothing was seen of the defect. In November, 1907, she was examined, after taking the ground at one of the Greek Islands, by Lloyd's and the underwriters' surveyors, but nothing was seen of the defect. On November 25, 1908, she was examined for damage by stranding in the Dardanelles in October, 1908, and heavy weather in August, 1908, by Lloyd's and

underwriters' surveyors, who recorded damage to the stern frame riveting and rudder strap, but though she was scraped this defect was not found. I find that it was then there; that, if a minute examination had been made of this particular spot, it would have been found; but that in the absence of anything to direct attention to that precise spot there was no negligence on any one's part in not discovering it.

"The policy in question began to cover the ship on December 8, 1908. She went on a voyage, in the course of which she met with the ordinary winter incident of ice in the Black Sea, and is said to have grounded near Bremerhaven, and on returning to England she was docked for painting at Barry on March 8 and 9, 1909. The defect was then found. Lloyd's surveyor says he saw a suspicious line, and directed the workmen to scrape; others say the workmen found the defect first in scraping, and called the surveyor's attention to it. The underwriters' surveyors were then looking for ice damage along the water line, and did not at first see the crack. Anyhow the defect once minutely scraped was clearly visible. Apparently the metal welded in the crack had corroded or come off, and a fissure was obvious. I accept the view that it had all the appearance of a cooling crack, and not of a violent fracture of the originally sound casting. The stern frame was condemned, removed and broken; it broke not at the join of the original metal with the V-shaped wedge, but along the line of the fissure; and the appearances of the broken metal were said by several witnesses, and I accept their view, to have all the appearance of a cooling crack or flaw.

"The plaintiffs' witnesses suggested that the ice in the Black Sea or the grounding near Bremerhaven had either cracked the stern frame or made a latent defect visible. They disagreed as to which event had had this effect; and as to each event respectively some of them thought that it had not had this effect. I am not satisfied that there was any stranding near Bremerhaven. The chief officer's log does not mention this stranding at all; and the mate and captain first mention the stranding after the fissure was discovered, when their signatures appear on a letter to their owners, though the mate had forgotten

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he had signed such a letter. The chief engineer's log does mention the grounding, but the chief engineer's log is, in my opinion, not a contemporary document, but has been all written up at the same time from some earlier document. The chief engineer was not examined in Court, and I regret this point was not put to him, but I can only state the impression I have formed on looking at the document. Further, the suggested stranding and twist to starboard will not account for a fracture on the starboard side of the plate. I am not satisfied that the alleged stranding had anything to do either with the fracture or its discovery. In the Black Sea the vessel appears to have forced her way through ice on going into or out of Odessa. She was undamaged unless this fissure was due to ice. It was on her keel far below the water line. It was suggested that the propeller jammed ice on to the stern frame, but the propeller, which is far weaker than the stern frame, is undamaged. I am not satisfied that the ice either made the fracture or increased it.

"In the result I find that there was an obvious defect in the stern frame at Skoda; that it was covered up by the makers and remained undiscoverable by reasonable inspection until after the commencement of the policy; and that its becoming visible was due to the ordinary wear and tear of a ship's life."

*Bailhache*, K.C., and *C. Robertson Dunlop* (*Carden Noad* with them), for the plaintiffs. The defect in the stern frame was not, and could not have been, discovered until the ship was in dock at Barry in March, 1909, at which time the policy had attached. The plaintiffs are entitled to recover as a loss under the policy the repairs necessitated by the existence of a latent defect which was only discoverable during the currency of the policy. The plaintiffs' remedies under the policy are not confined to actual damage to the hull or machinery caused by a latent defect: *Oceanic Steamship Co.* v. *Faber*. (1)

*George Wallace*, K.C., and *A. H. Chaytor*, for the defendants. The words "loss of or damage to hull or machinery" in this policy only cover loss or damage caused to the hull or machinery by a latent defect or by any of the other specified causes. They

(1) (1906) 11 Com. Cas. 179; (1907) 13 Com. Cas. 28.

do not include expenses incurred by the shipowners in remedying a latent defect. That was the view expressed by Fletcher Moulton L.J. in *Oceanic Steamship Co.* v. *Faber*. (1) This policy further provides that loss or damage is only covered by the insurance if it has not resulted from want of due diligence on the part of the owners or their servants, and it therefore became the duty of the plaintiffs, when the defect was discovered, to replace the stern frame at their own cost, for otherwise they would have failed to shew due diligence. A contract of insurance is a contract of indemnity, but if the plaintiffs are entitled to recover in this action they will get more than an indemnity, for they will have obtained, at the expense of the underwriters, a sound ship in the place of one which ever since she was built was unsound, in that she had a defect in her stern frame. In other words the plaintiffs are seeking to make the underwriters liable for the consequences of ordinary wear and tear.

*Bailhache, K.C.*, replied.

*Cur. adv. vult.*

Jan. 30. SCRUTTON J. read the following judgment:—In this case, heard before me without a jury, the owners of the steamship *Ellaline* claimed against the defendants as underwriters a sum of 137*l.* odd, being the defendants' proportion of an expense of about 2300*l.* incurred by the plaintiffs in replacing a stern frame condemned because of a crack or fissure. [The learned judge stated the facts as set out above, and continued:—] Was this "loss of or damage to the hull through a latent defect"?

The clause I have to construe is commonly known as the "Inchmaree Clause." The machinery of the *Inchmaree* was damaged by an explosion, either through a valve becoming salted up, not in ordinary wear and tear, and the closing not being discoverable by reasonable care, or by the valves being closed by negligence of the engineers. The House of Lords in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2) held that such a damage was not recoverable either as a peril of the sea or under the general words in a Lloyd's policy. The Inchmaree Clause was introduced to give the protection denied

(1) 13 Com. Cas. 28. (2) (1887) 12 App. Cas. 484.

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by this decision. It covers the negligence of servants, it covers explosion and bursting of boilers, it mentions breakage of shafts, which is rather a damage in itself than a peril causing damage, and it then covers loss or damage through latent defects.

I have some, though a rather embarrassing amount of, guidance on the meaning of the clause in the decision in the case of *Oceanic Steamship Co.* v. *Faber*. (1) The *Zealandia* was insured against port risks in San Francisco for twelve months from May 18, 1902, with an Inchmaree clause. She had been last examined in October, 1900, when the shaft was found in order. She was on a voyage till July 10, 1902, when the port risks commenced. She lay in port till October, 1902, when on being docked a fracture in the shaft was discovered, and it was condemned. It was proved that there had been a latent defect in the shaft since 1891. On the facts Walton J. and the Court of Appeal all agreed that there was no claim on the policy either for breakage of the shaft or loss or damage through latent defect, as there was no evidence that the shaft had broken, or the latent defect had first become visible, during the period of port risk, and mere discovery during the period, though followed by condemnation, did not give a claim. This disposed of the case, but Walton J. had held that the latent defect becoming patent was not damage to the machinery through a latent defect. The Court of Appeal stopped the respondents' counsel on his raising the point on which all the judges concurred, but proceeded to express their opinion on the points which he had been stopped from arguing, and on those, in my opinion, they differed. I have considered the judgments carefully; one at least of them, as reported, is difficult exactly to appreciate; but I read the judgment of Fletcher Moulton L.J. as differing sharply from that of Buckley L.J., and I think Lord Alverstone's judgment is on the same lines as that of Buckley L.J. Under these circumstances I do not think I am bound either by the views of Walton J. (whose views on any question of marine insurance will always be read by the profession with the deepest respect), for his views on this question were doubted by two members of the Court of Appeal. Nor am I bound by the

(1) 11 Com. Cas. 179; 13 Com. Cas. 28.

opinions of the Court of Appeal on a question they had not heard argued. I therefore state my own views, formed after the most careful and respectful consideration of the opinions in that case.

The Inchmaree Clause is, in my view, an extension of the list of perils insured against in an ordinary Lloyd's policy, and only the actual loss or damage to hull from the named perils is recoverable. Loss to the shipowner's pocket is only recoverable as the measure of the actual loss of or damage to hull. Thus, if under two consecutive time policies the hull was damaged during the period of the first policy, but repaired and paid for during the second, the shipowner would recover under the first policy for damage to hull, not under the second when he suffered the cost of replacing the damage. For an elaboration of this point I refer to the judgments of the Court of Appeal in *Field Steamship Co.* v. *Burr.* (1) A ship was injured by sea perils ; water entered the hold through a hole made by a collision, and converted the cargo into a putrid mass. The shipowner claimed under the ship policy the cost of removing the cargo. It was held that there was no loss of or damage to the ship, the subject-matter insured, but only to the pocket of the shipowner, and this was not recoverable under a policy against loss of the ship.

In the present case, has any damage to the hull occurred during the currency of the policy through latent defect? The only damage is, in my view, the latent defect itself, which by wear and tear has become patent. But the latent defect did not arise during the currency of the policy ; it existed in 1906, and the underwriter does not insure against ordinary wear and tear and its consequences. Has any part of the hull been lost in fact during the currency of the policy? The stern frame has not been lost in fact ; it is there as it was before the policy began ; the only change is that a previous latent defect has by wear and tear become patent. It has not been constructively lost during the currency of the policy ; it was constructively lost in 1906, if the true facts had been known ; what has happened during the currency of the policy is the discovery of the true facts. If it is said there is a loss of hull, because the shipowner has had to replace it and suffered loss during the currency of

(1) [1899] 1 Q. B. 579.

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Scrutton J.

the policy, it is true that the expense is incurred during the currency of the policy, but the damage alleged to be covered by the policy, as a latent defect, came into existence in 1906, and must have been repaired then, if discovered.

For these reasons I hold that no loss of or damage to hull has happened during the currency of the policy from perils insured against, and that the discovery of pre-existing loss or damage, though impossible on reasonable examination before the date of the policy, is not enough to give a claim.

In my view what is recoverable under this part of the Inchmaree Clause is : (1.) Actual total loss of a part of the hull or machinery, through a latent defect coming into existence and causing the loss during the period of the policy. This was the kind of latent defect alleged in the *Inchmaree* case. (2.) Constructive total loss under the same circumstances, as where, though the part of the hull survives, it is by reason of the latent defect of no value and cannot be profitably repaired. (3.) Damage to other parts of the hull happening during the currency of the policy, through a latent defect, even if the latter came into existence before the period of the policy. The pre-existing latent defect itself is not damage, indemnity for which is recoverable, even if by wear and tear it becomes visible during the policy.

I think this is substantially the result arrived at by Fletcher Moulton L.J. and Walton J. ; and it is not uninteresting to note that it was the result arrived at by the plaintiffs' solicitors, who wrote, in making a claim on behalf of their clients on a third party, "We have exhaustively inquired into the question as to whether or not the cost of renewing the stern frame can be recovered from underwriters, and it was with much regret that we came to the conclusion that no claim could possibly be asserted." Arriving by independent investigation at the same conclusion I give judgment for the defendants with costs.

*Judgment for defendants.*

F. O. R.

The plaintiffs appealed.

May 25. *Bailhache*, K.C., and *C. Robertson Dunlop* (*Carden Noad* with them), for the plaintiffs. There was in the present case during the currency of the policy a loss of part of the hull through a latent defect in the hull within the meaning of the Inchmaree Clause in the policy. The latent defect intended by that clause may be a defect latent at the time when the risk attaches, and the policy indemnifies the assured against such a defect which causes loss during the currency of the policy. The loss was occasioned when, the defect becoming patent, it became necessary to put a new stern frame into the ship. Scrutton J. was of opinion that the clause would cover loss or damage occasioned to hull or machinery during the currency of the policy by a latent defect which existed before the policy was effected, but not a loss of the defective part itself during the currency of the policy. It is submitted that there is no reason for so restricting the meaning of the words. In *Oceanic Steamship Co.* v. *Faber* (1) Walton J. was of the same opinion as Scrutton J. in the present case, and in the Court of Appeal, though it became unnecessary to decide the point, there seems to have been a difference of opinion as to the meaning of the clause, the Lord Chief Justice and Buckley L.J. appearing to have taken the view for which the plaintiffs contend, whereas Fletcher Moulton L.J. seems to have taken the opposite view. Buckley L.J., after saying that there had been in that case no breakage of shaft, said: "That leaves the words 'any latent defect in the machinery.' I agree that, if a shaft has disclosed such weakness as that it is condemned, and that happens during the currency of the policy, that would be a risk covered by the policy."

[FLETCHER MOULTON L.J. The concluding sentence of the judgment of Buckley L.J. seems to be against the plaintiffs' contention. He there says: "This was only a policy on the vessel while she was lying up, and considering the smallness of the premium, I do not think that the risk which was covered included the risk of discovering, during the currency of the policy, that a latent defect which had been existing for some time was there."]

He seems to be there dealing with the construction of the

(1) 11 Com. Cas. 179; 13 Com. Cas. 28.

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policy in the particular case, having regard to the special circumstances of that case. The earlier portion of his judgment is, it is submitted, distinctly in favour of the plaintiffs' contention.

*George Wallace, K.C.*, and *A. H. Chaytor*, for the defendants, were not called upon to argue.

VAUGHAN WILLIAMS L.J. In my opinion this appeal fails. I agree with the judgment of Scrutton J., which, I think, runs, substantially, on the same lines as that of Walton J. in *Oceanic Steamship Co.* v. *Faber*. (1) I propose to refer to a passage in the judgment of Walton J. in that case, with which I entirely agree, and which appears to me to put the case in the most admirably clear and logical manner. We could not, I think, assent to the argument put before us in the present case on behalf of the plaintiffs without holding that the decision of Walton J. in that case was wrong. He says, "It seems to me quite plain that the effect and sense of this clause is not that the underwriters guarantee that the machinery of the vessel is free from latent defects, or undertake, if such defects are discovered during the currency of a policy, to make such defects good. It is plain that that is neither the intention of those who drew this clause, nor is it the sense of the clause itself, if reasonably read, and reasonably construed. The underwriters agree to indemnify the owner against any loss of or damage to the hull or machinery through any latent defect, so that a claim does not fall within the clause unless there is loss of or damage to hull or machinery, or some part of the hull or machinery, and there is no claim unless that damage has been caused through a latent defect, or through one or other of the causes that are mentioned in the clause—in this particular case through a latent defect. Therefore there must be a latent defect causing loss of or damage to the hull or machinery, and causing that loss of or damage to the hull or machinery during the currency of the policy under which the claim is made. If those conditions are fulfilled, the underwriters are liable to indemnify the owners in respect of that loss or damage." He says later on: "The crack

(1) 11 Com. Cas. 179.

which is the damage, the only damage which is proved, is really nothing but the development of the flaw—that is of the latent defect. In my opinion the development of a latent defect is not 'damage to the machinery through a latent defect.' In such a case I think the damage is not damage caused by a latent defect, but is the latent defect itself and nothing more: a latent defect becoming patent is not within the words of this clause 'damage to the machinery through a latent defect.'" This appears to me to be admirably put by Walton J. I should not be justified, I think, in occupying the public time by reading more of his judgment. In the words which follow those which I have read, he proceeds to apply the principle so laid down by him to the facts of the case then before him, and what he says so emphasizes that principle that one is greatly tempted to quote more of his judgment, but I think that it is sufficient for me to say that I agree with his judgment and the reasoning on which it proceeded.

It is said, however, that there was an appeal in that case (1), and that on the appeal the judgments delivered by the Lord Chief Justice and Buckley L.J. differed from the view expressed by Walton J. I think that it cannot be said that, in the judgment delivered by the Lord Chief Justice on the appeal, he expressly differed from that view, but merely that he did not affirmatively agree with it. With regard to the judgment of Buckley L.J., it is impossible to say that the words which he used in the last clause of his judgment are in any way inconsistent with the judgment of Walton J. in that case, or that of Scrutton J. in the present case. A difficulty arises because it is said that there is a certain passage in the earlier part of his judgment which does not seem easy to reconcile with the later passage. The judgments of Buckley L.J. are, as a rule, singularly clear, but I am not prepared with respect to the judgment in question to explain how the two passages in question can be reconciled. I have suggested that in the earlier passage the learned Lord Justice was, perhaps, only calling attention to the fact that in the particular case before the Court the question of construction really did not arise because it did not appear on the

(1) 13 Com. Cas. 28.

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evidence whether the discovery of the latent defect took place before or after the policy came into operation. This, however, is only speculation on my part. The appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion, and will only add a very few words. In my judgment the Inchmaree Clause is, emphatically, one of insurance against perils, though not necessarily perils of the sea. The case of *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1) in the House of Lords had decided that the assured in that case could not recover upon a policy of marine insurance in the form then usual for a loss which might just as well have occurred anywhere on shore as at sea. In that case the valve of a donkey engine had got out of order, and, in consequence, while the engine was being used in pumping water into the boilers, the air chamber of the donkey pump was damaged, but this had nothing to do with any peril of the sea, or any of the other perils enumerated in the policy. In consequence of the decision in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1), the Inchmaree Clause was introduced into policies in order to extend the operation of the policy to risks of the same type as that which had occurred in that case. We must, of course, construe the clause by reference to its terms, without any preconceived view as to its meaning, but at the same time it is desirable to bear in mind how and why it came into existence. It begins with the words, "This insurance also specially to cover . . . . loss of or damage to hull," &c., thus shewing that the contract still remains one of insurance with regard to the special risks enumerated. Now what are the facts of the present case? In casting the stern frame of the vessel a defect was caused, which made the stern frame a most improper stern frame to put into any vessel. That defect was concealed by the makers of the stern frame with some metal and steel wash; and such was the condition of the vessel when the policy was effected. During the currency of the policy, the defect was discovered while the ship was undergoing repairs, and the stern frame was in consequence condemned by Lloyd's surveyors. It is suggested that this was a

(1) 12 App. Cas. 484.

"loss of or damage to hull through a latent defect in the hull" within the meaning of the Inchmaree Clause. It was in my opinion nothing of the kind. It was not loss or damage caused by a latent defect, but a latent defect itself. To hold that the clause covers it would be to make the underwriters not insurers, but guarantors, and to turn the clause into a warranty that the hull and machinery are free from latent defects, and, consequently, to make all such defects repairable at the expense of the underwriters. There are no words in the clause which warrant such an interpretation. The fact that it begins with the word "insurance" negatives, in my opinion, the possibility of its being so interpreted. It is contended that the clause has been so interpreted by the Lord Chief Justice and Buckley L.J. in *Oceanic Steamship Co.* v. *Faber.* (1) The language used by Buckley L.J. at the end of his judgment appears to me conclusive against that contention. I cannot help thinking that any ambiguity in the earlier part of his judgment is due to the fact that "breakage of shafts" is specially referred to earlier in the clause in another context. It seems to me possible that a difficult question may arise in future as to whether breakage of shafts is not by the language of the clause put in a special position in which other defects in machinery and hull are not. I think that it was probably in considering the effect of the special words in reference to "breakage of shafts," which do not apply in the present case, that Buckley L.J. used the words in the earlier part of his judgment which give rise to the apparent ambiguity that has been referred to. I do not think that he intended to express any disagreement with the judgment of Walton J. or with what I said in my judgment.

FARWELL L.J. I agree. I desire to adopt the admirable judgment of Walton J. in *Oceanic Steamship Co.* v. *Faber.* (2)

*Appeal dismissed.*

Solicitors for plaintiffs: *Holman, Birdwood & Co.*

Solicitors for defendants: *Coward & Hawksley, Sons & Chance.*

(1) 13 Com. Cas. 28. (2) 11 Com. Cas. 179.

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*April* 11.

## DONKIN *v.* PEARSON (on behalf of the Amalgamated Society of Engineers).

*County Court—Practice—Removal of Action from County Court to High Court—Discretion of Judge—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 126.

Sect. 126 of the County Courts Act, 1888, provides that "It shall be lawful for the High Court or a judge thereof to order the removal into the High Court, by writ of certiorari or otherwise, of any action or matter commenced in the court under the provisions of this Act, if the High Court or a judge thereof shall deem it desirable that the action or matter shall be tried in the High Court, and upon such terms as to payment of costs, giving security, or otherwise as the High Court or a judge thereof shall think fit to impose":—

*Held*, that in determining whether it is "desirable" within the meaning of the section that the action should be tried in the High Court the test to be applied is whether it is more fit to be tried in the High Court than in the county court, and that the party applying for the order for removal of the action into the High Court must establish that point.

The defence to an action commenced in the county court depended solely on the determination of a difficult question of law. The defendant, who was the secretary of a local branch of a society, a trade union, was sued on behalf of the society. The plaintiff, a member of the society, was a poor man and, in an application made by the defendant for an order for removal of the action into the High Court, made allegations of oppressive conduct on the part of the society (which, however, the High Court found were not established) with regard to the costs of a former action brought by the plaintiff against it:—

*Held*, that it was desirable within the meaning of the section that the action should be tried in the High Court, and that the order for removal ought to be made, proper terms for the protection of the plaintiff being inserted in the order by virtue of the power conferred by the words "upon such terms as to payment of costs . . . . or otherwise as the High Court or a judge thereof shall think fit to impose" in the section.

*Quære* whether the alleged oppressive conduct on the part of the society would, if it had been established, have been a matter proper to be taken into consideration in determining whether the action should be tried in the High Court instead of the county court.

Appeal from an order made by Horridge J. at chambers.

The action was brought in the county court of Lancashire holden at Manchester to recover the sum of 4*l.* from the defendant Pearson, who was the secretary of the local (Collyhurst) branch of the Amalgamated Society of Engineers and defended the action on behalf of the society.

The following were the particulars of the plaintiff's claim:—

"On or about February 12, 1870, the plaintiff became a member of the defendant society and paid weekly contributions to certain collectors of the defendant society for a period of about thirty years when in consequence of illness he ceased work and for the last few years has received sick pay at the rate of 5*s*. per week up to July 1, 1910.

"The plaintiff has not received any sick pay whatever since July 1, 1910.

"The plaintiff claims the sum of 4*l*. being sick pay at the rate of 5*s*. per week from July 1, 1910, up to October 21, 1910, inclusive."

The defendant took out a summons before the Master in chambers asking for an order that the action should be removed into the King's Bench Division of the High Court pursuant to s. 126 of the County Courts Act, 1888.

In support of the summons the defendant made an affidavit stating that the society was a registered trade union and one of the largest in the United Kingdom, having a membership of 110,000, and that it was of the greatest importance to the society and its members and to similar trade societies that it should be determined by the High Court whether or not the society would be, but for the Trade Union Acts, an unlawful combination by reason of the objects and purposes thereof being in restraint of trade, and whether it could or could not sue and be sued by its members in respect of benefits and other matters in dispute between the society and its members.

The plaintiff made an affidavit in opposition to the summons stating (inter alia) that if the case were removed he would not be able (owing to his financial position) to prosecute the proceedings, and it would follow that the case would ipso facto collapse.

The Master made an order that the action be removed into the High Court subject to the following terms:—

"(*a*) Payment (without prejudice to the defendant's rights) of 5*s*. a week from this date to the date of the trial.

"(*b*) That the defendant pays in any event the difference in costs between the proceedings in the county court and in the High Court."

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The plaintiff appealed to the judge. In support of the appeal an affidavit was filed on behalf of the plaintiff alleging that although no order had been made against the plaintiff for payment of the society's costs in a former action brought by him against it, in which the county court judge had held that it would not have been an unlawful society at common law, but found in its favour on the merits, and the society had not attempted to tax its costs in that action, it proposed in the most arbitrary manner to penalize the plaintiff for bringing that action by refusing sick pay to him until he had repaid to the society the amount of its untaxed costs.

Horridge J. at chambers allowed the appeal and discharged the order of the Master, but gave leave to appeal.

The defendant appealed.

*C. A. Russell, K.C.*, and *J. D. Crawford*, for the defendant. The case for the defendant is that the society would but for the Trade Union Acts be unlawful as being in restraint of trade, and that by reason of s. 4 of the Trade Union Act, 1871 (34 & 35 Vict. c. 31), the action will not lie. That section provides (inter alia) that nothing in the Act shall enable any Court to entertain any legal proceeding instituted with the object of enforcing any agreement for the application of the funds of a trade union to provide benefits to members. It is far more convenient that a question of that kind should go before a judge of the High Court and thence direct to the Court of Appeal. That it is a very difficult question of law is shewn by the decision in the Court of Appeal in *Osborne* v. *Amalgamated Society of Railway Servants* (1), in which the judgment of Warrington J. was reversed.

*E. G. Palmer*, for the plaintiff. This Court will not overrule the discretion of the judge unless the judge has in effect misdirected himself. Under s. 126 of the County Courts Act, 1888, the judge has a complete discretion as to whether the action ought or ought not to be removed to the High Court. The words " it shall be lawful " in s. 126 of the Act of 1888 give a much wider discretion to the judge than the words " in cases which shall appear to such judge fit to be tried in one of the

(1) [1911] 1 Ch. 540.

superior Courts " contained in the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), schedule, clause 12, and yet in *Banks* v. *Hollingsworth* (1) it was held that it was, under those words, a matter for the judge's discretion. The judge came to the conclusion that the order for removal would cause hardship to the plaintiff. There has been oppressive conduct on the part of the society. [*Staples* v. *Accidental Death Insurance Co.* (2), *Soloman* v. *London, Chatham and Dover Ry. Co.* (2), and *Kenworthy* v. *Sidebottom* (3) were also referred to.]

*Russell, K.C.*, in reply. In reading decisions before the passing of the County Courts Act, 1888, it must be remembered that s. 126 of that Act contains the words " upon such terms as to payment of costs, giving security, or otherwise as the High Court or a judge thereof shall think fit to impose." These conditions as to removal were not in force at the time of those decisions.

LORD ALVERSTONE C.J. This is a case in which we ought to give the grounds upon which we base our decision so as if possible to afford some guide as to the course to be adopted when an application is made under s. 126 of the County Courts Act, 1888, for an order that an action be removed from a county court into the High Court. The decision of the judge which is before us on this appeal is not quite in the position of a decision which only involved a mere exercise of judicial discretion. The judge was exercising his discretion in relation to a previous order made by the Master. It is conceded by the defendant that the only defence he desires to raise is that the society would, but for the Trade Union Acts, be unlawful. It is not disputed by the plaintiff that that question has been raised and decided in the county court in other proceedings, and it is suggested by the defendant that the same difficult question of law has been considered in *Osborne* v. *Amalgamated Society of Railway Servants*. (4) In my judgment, therefore, the case is prima facie directly within s. 126 of the County Courts Act, 1888, as one desirable to be tried in the High Court. There is no suggestion that there is any question

(1) [1893] 1 Q. B. 442.
(2) (1861) 10 W. R. 59.
(3) (1876) Unreported.
(4) [1911] 1 Ch. 540.

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as to witnesses' expenses or that there is any issue of fact to be tried. The question of law to be determined in the action rests on the rules and regulations of the society. In these circumstances the Master made an order for removal of the action into the High Court upon the terms of "payment (without prejudice to the defendant's rights) of five shillings a week from this date to the date of trial." I doubt whether the hardship to the plaintiff which was alleged to have been caused to him by his treatment by the society was a legal or proper consideration to be regarded in exercising a judicial discretion as to whether the action ought to be removed, but if it was a proper consideration, it seems to be met by the terms I have mentioned under which the defendant was put. The Master further ordered the defendant to pay in any event the difference between the costs which would have been incurred in the county court and those incurred in the High Court.

That is the order which I think ought to have been made. If when the matter came before the judge he considered that the action ought not to be tried in the High Court because the society had not acted in the way he approved of in regard to the payment of sick pay, or had told the plaintiff that he would not receive any more until he paid the 6*l.* the costs involved in the previous action, I cannot think that that was quite a matter to be taken into consideration in ordinary circumstances as regards the question whether it was desirable that the action should be tried in the High Court. I therefore think that, it being a case in which possibly the judge exercised his discretion upon grounds that were not strictly germane, we ought to review the exercise by him of his discretion, and the order made by the Master seems to contain the substantial terms upon which the case ought to be removed. I am therefore of opinion that this appeal should be allowed and the order of the Master restored.

BRAY J. I am of the same opinion. Sect. 126 of the County Courts Act, 1888, allows the High Court to say whether it deems it desirable that the action should be tried in the High Court. The first thing that the High Court has to consider is in which

tribunal is it proper that the action should be tried. I have always acted in chambers upon the rule laid down in *Banks* v. *Hollingsworth* (1), although that case turned upon another statute, namely, that the test which ought to be applied is whether the action is more fit to be tried in the High Court than in the county court. It is, of course, for the party applying for the order for removal to satisfy the Court on that point; and when it appears, as it does here, that there is only one question to be tried, and that undoubtedly a difficult—I might almost say a most difficult—question of law, it seems to me that the defendant has shewn the Court that it is most desirable that this action should be tried in the High Court. The expression "desirable" in s. 126 of the County Courts Act, 1888, includes other matters than the mere fact that a difficult question of law is involved; for instance in the present case the Court is bound to consider the fact that the plaintiff is a poor man and that it would be hard that he should pay large sums in costs. That the Court is bound to protect him from, and it does so under the words "subject to such terms," &c., at the end of the section. I think that the Master imposed the proper terms. I do not think there is anything in this case which would justify a judge in saying that the society has behaved badly, and that upon that ground he would not order the action to be removed into the High Court. If there were no bona fide defence to the action it would be a ground for refusal to make an order for removal, because in that case the action would be as equally fit to be tried in the county court as in the High Court. But, taking all the circumstances of the present case into consideration, it seems to me that the order of the Master was right.

LORD COLERIDGE J. I agree.

*Appeal allowed.*

Solicitors for plaintiff: *Lawrence Jones & Co., for Barlow & Rowland, Accrington.*

Solicitors for defendants: *Wheatley, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

(1) [1893] 1 Q. B. 442.

J. E. A.

K. B. D.
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*March* 8.
C. A.
*April* 11.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

## WHITE, SON & PILL *v.* STENNINGS.

*County Court—Attachment of Debts—Judgment Debt payable on a future Date—Garnishee Summons issued before Date named for Payment—Jurisdiction—County Court Rules*, 1903, *Order* XXVI., *rr.* 1, 12, 14.

By Order XXVI., r. 1, of the County Court Rules, 1903, a person who has obtained a judgment or order for the recovery or payment of money may, upon lodging with the registrar of the Court an affidavit stating that judgment has been recovered or an order made, and that "it is still unsatisfied," and to what amount, and that any other person (called the garnishee) is indebted to the judgment debtor, enter a plaint to obtain payment to him of the amount of the debt due to the debtor, and thereupon a summons calling upon the garnishee to shew cause why he should not pay the debt to the judgment creditor shall be issued:—

*Held*, reversing the decision of a Divisional Court, that garnishee proceedings under the above-mentioned rule cannot be commenced upon a county court judgment for payment of money before the time given by the judgment for payment of the money has expired.

APPEAL from the county court of Hertfordshire holden at Barnet.

Upon September 20, 1910, the plaintiffs recovered judgment against the defendant for 14*l.* 8*s.* 10*d.* debt and costs to be taxed, the amount of the judgment to be paid into Court fourteen days after the taxation. The costs were taxed on September 29 at 4*l.* 2*s.* 10*d.*, and thereupon the judgment debt amounting to 18*l.* 11*s.* 8*d.* became payable on October 13.

On September 29, upon affidavits lodged on behalf of the plaintiffs stating that the judgment was "still unsatisfied" and that three persons (called the garnishees) were indebted to the defendant, garnishee summonses were issued under Order XXVI., r. 1 (1), calling upon the garnishees to shew cause why they

(1) County Court Rules, 1903, Order XXVI., r. 1 (which is under the heading Attachment of Debts"): "Any person who has obtained a judgment or order for the recovery or payment of money may, either before or after any oral examination of the debtor liable under such judgment or order, upon lodging with the registrar of the Court in

should not pay to the plaintiffs the debts due from them to the defendant.

The summonses were returnable on October 18. On October 7 the defendant paid the amount of the judgment debt into Court, and on the same day he gave notice to the plaintiffs that he would on October 18 apply for an order to set aside the garnishee proceedings upon the ground that the same were issued before the debt and costs became due and payable. Upon October 18 the defendant's application to dismiss the garnishee summonses came on for hearing, when it was contended on his behalf that there was no jurisdiction to issue the summonses before the judgment debt was payable. The county court judge held that there was jurisdiction to issue the summonses and dismissed the application. The defendant appealed. (1)

*Farleigh*, for the defendant. A judgment creditor cannot take garnishee proceedings under Order XXVI., r. 1, of the County Court Rules, 1903, until the judgment debtor has made default in payment of the judgment debt as directed by the judgment. The words "still unsatisfied" in that rule mean unsatisfied after the time named for payment. The word "unsatisfied" has the same meaning as in Order XXV., r. 8, which carries out the provisions of s. 146 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), and which deals with the issue of execution against the

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which the judgment or order was given or made an affidavit by himself or his solicitor stating that judgment has been recovered or an order made, and that it is still unsatisfied, and to what amount, and that any other person (hereinafter called the garnishee) is indebted to such debtor, and is in respect of such debt within the jurisdiction of the Court, and could be or has been sued therein with or without leave under section 74 of the Act, enter a plaint to obtain payment to him of the amount of the debt due to the said debtor from the garnishee, or so much thereof as may be sufficient to satisfy the said judgment or order, together with the costs of the garnishee proceedings; and thereupon a summons in the form in the Appendix, calling upon the garnishee to shew cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgment or order, together with the costs aforesaid, shall be issued by the registrar . . . ."

(1) The hearing of the garnishee summonses stood over pending the appeal.

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goods of a judgment debtor, where it means unsatisfied after the defendant has made default in payment of the judgment debt. The provisions of ss. 60—67 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) (1), are made applicable to county courts, and Order XXVI. is framed to carry out those provisions. The decisions therefore upon s. 61 of the Common Law Procedure Act, 1854, are in point in considering Order XXVI., r. 1. Attachment of debts by means of garnishee proceedings is a form of execution, and can only be resorted to when the judgment debtor's goods could have been taken in execution under a fi. fa.: *Jones* v. *Jenner* (2); *Miller* v. *Mynn* (3); *Jauralde* v. *Parker*. (4) Order XXVI., r. 1, ought to be construed as carrying out the provisions of s. 61 of the Common Law Procedure Act, 1854, and if the words of the rule in their ordinary meaning go beyond the plain meaning of the section, they ought to be construed in accordance with the construction placed by those cases upon the enactment so as to prevent them from creating possible injustice. If the words of the rule must be construed in their wide meaning, they go beyond the Act and are ultra vires. Rule 14, which gives the county court judge a discretion to dismiss the garnishee summons, contemplates a case where the judgment creditor has a right to issue the summons, and it does not affect the right of the judgment debtor to apply to have the summons dismissed upon the ground that there was no jurisdiction to issue it. [*Kennett* v. *Westminster Improvement Commissioners* (5), *Hayter* v. *Beall* (6), and Day's Common Law Procedure Acts, 4th ed., p. 314, n., were also referred to.]

*Holman Gregory, K.C.*, and *Rudolph Moritz*, for the plaintiffs, were not called upon.

RIDLEY J. In my opinion the decision of the county court judge was right. The question which we have to decide turns upon the meaning of certain words in Order XXVI., r. 1, of the

(1) These sections were repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), but the application thereof to county courts was not affected by the repeal.
(2) (1856) 25 L. J. (Ex.) 319.
(3) (1859) 1 E. & E. 1075.
(4) (1861) 6 H. & N. 431.
(5) (1855) 11 Ex. 349.
(6) (1881) 44 L. T. 131.

County Court Rules, 1903, though Order xxv., r. 8, and s. 146 of the County Courts Act, 1888, have been referred to as throwing light upon its meaning. The question is whether before the judgment debtor is in default in payment of the judgment debt it is open to the judgment creditor to commence garnishee proceedings. It is said that the judgment creditor must wait until the judgment debtor has made default in payment according to the terms of the judgment, that is to say, has made default in payment of the whole amount of the judgment debt, or of an instalment if the judgment debt is ordered to be paid by instalments. I do not think so. Order xxvi., r. 1, makes it a condition precedent to the commencement of garnishee proceedings that the judgment "is still unsatisfied." We must construe those words according to their natural meaning unless there is something which obliges us to give them some other meaning. A judgment debt is "still unsatisfied" until it is paid, even though the time has not arrived at which, in accordance with the terms of the judgment, the money has to be paid, that is to say, even though the time has not arrived when execution can be issued. It is therefore, in my opinion, correct to say that a judgment debt which is not paid is "unsatisfied." The argument against this view is that the word "unsatisfied" in reference to a judgment debt also occurs in Order xxv., r. 8, that it is there used in the sense of unsatisfied after default has been made in payment, and that therefore when we find the same word used in Order xxvi., r. 1, we ought to construe it as having the same meaning as in the earlier rule. That reasoning does not commend itself to me as being sound. Order xxv., r. 8, which is framed to carry out the provisions of s. 146 of the County Courts Act, 1888, deals with a different subject-matter from that dealt with in Order xxvi., r. 1. It deals with the enforcement of a judgment or order by execution against the goods of the judgment debtor, and the word is used in a different context. That rule states that "where a defendant has made default in payment of the whole amount awarded by the judgment or order, or where the judgment or order was for payment by instalments of an instalment thereof, a warrant of execution may issue against his goods without leave; and such execution shall be

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for the whole amount of the judgment or order and costs then remaining unsatisfied, or in the case of an order for payment by instalments for such portion thereof as the Court shall order . . . ." In that context the word "unsatisfied" means that the date fixed by the judgment for payment of the debt has arrived and default has been made in payment. Order xxvi. deals with attachment of debts, and its object is that debts which are owing to a judgment debtor may be attached in aid of the judgment creditor, and at the same time in relief of the goods of the judgment debtor to the extent to which the garnishee proceedings are fruitful, somewhat as in former days a judgment creditor who took the judgment debtor in execution under a ca. sa. could not also take the judgment debtor's goods in execution or attach the debts due to him. It is a remedy for the satisfaction of the judgment debt, which is beneficial to both parties. During the interval between the date of the judgment and the date named therein for payment of the judgment debt into Court there seems to me to be no reason why garnishee proceedings should not be commenced under Order xxvi., r. 1. The summons to the person who is alleged to owe the debt to the judgment debtor is to shew cause on a future day why an order should not be made for payment of the amount of the debt to the judgment creditor; there is no order for immediate payment of the debt to the judgment creditor. It is merely the issue of a summons to bring the matter for hearing before the county court judge at a later date. In my opinion the intention of the rules is that a judgment creditor should have this remedy, and Order xxvi., r. 14, gives the county court judge full discretion at the hearing to deal satisfactorily with the matter if, in his opinion, the proceedings are worthless or vexatious. In the present case the defendant did not ask the judge at the hearing to dismiss the garnishee summonses under that rule and to give him the costs thereof under r. 12, but took the point that there was no jurisdiction to issue the summonses at a date before the time named for payment of the judgment debt. In my opinion that was not a good point. The judgment of the county court judge was right and must be affirmed.

CHANNELL J. I am of the same opinion. The only question which we have to decide is whether upon the true construction of Order xxvi., r. 1, of the County Court Rules, 1903, a person who has obtained a judgment in a county court for the payment of money upon a future day is entitled before that day arrives to commence garnishee proceedings against a third person who is alleged to owe a debt to the judgment debtor. It seems to me, in the first place, that that is a matter of county court practice and procedure, and it cannot therefore be said that, if the rule has that effect, it is ultra vires because such practice and procedure may not have been within the contemplation of s. 61 of the Common Law Procedure Act, 1854. It is a matter of county court practice and procedure in the application of that enactment to county courts.

With reference to the construction of Order xxvi., r. 1, there is no doubt that, speaking generally, garnishee proceedings are in the nature of execution, though a considerable time elapses before they result in the payment of the debt which it is sought to attach. The material words which we have to construe are "still unsatisfied," as applicable to a judgment for the recovery or payment of money. It is a condition precedent under r. 1 to the issue of a garnishee summons that the judgment creditor or his solicitor shall make an affidavit stating that the judgment "is still unsatisfied." It is possible that those words might be construed as meaning that the judgment debtor has made default in payment at the time when by the terms of the judgment he ought to have made the payment. That interpretation, however, would involve the introduction of words which are not in the rule. The prima facie meaning is that the judgment is not at the particular time satisfied. If it were necessary for the purpose of preventing injustice to read words into the rule so as to make it apply only where the judgment debtor has made default in payment, I should probably be prepared to do so. But in my opinion it is not necessary to do so in order to prevent injustice. Rules 12 and 14 of Order xxvi. provide a complete remedy if a judgment creditor uselessly or vexatiously takes out a garnishee summons, or it may be a number of garnishee summonses, before the time has arrived for payment of the

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judgment debt. In the present case the garnishee summonses were issued on September 29 upon the application of the plaintiffs and were returnable on October 18. The judgment was recovered on September 20, and the date named for payment of the judgment debt was October 13. The plaintiffs may have thought that, if the debts owing to the defendant were not attached before the time arrived for payment of the judgment debt, the defendant might himself collect them. Looking at r. 1 in conjunction with rr. 12 and 14, it does not seem to me to be necessary for its proper interpretation to insert therein words which are not there, so as to make the expression "still unsatisfied" refer to a time after the judgment debtor has made default in payment of the judgment debt. We must therefore give the rule its natural meaning. The result is that a judgment creditor has a legal right to issue a garnishee summons before the date named for payment of the judgment debt, but he does so at his peril, because if the judgment debtor pays the judgment debt at the time named for payment the county court judge may come to the conclusion that the garnishee proceedings are vexatious and may order the judgment creditor to pay the costs. The defendant in this case did not take the point that the garnishee proceedings were worthless or vexatious, but contended that under the rule the plaintiffs were not entitled at that stage to take out the garnishee summonses. The county court judge was right in deciding that point against the defendant. I understand that the judge has not yet dealt with the garnishee summonses or the costs thereof, and so he will be able to make what order he thinks proper under Order XXVI., rr. 12 and 14.

*Appeal dismissed.*

W. F. B.

The defendant appealed to the Court of Appeal.

April 11. *Farleigh*, for the defendant, used substantially the same arguments and cited the same authorities as in the Court below.

*Holman Gregory*, K.C., and *Rudolph Moritz*, for the plaintiffs. It is submitted that, upon the terms of Order XXVI., r. 1, of the

County Court Rules, the garnishee summonses were rightly issued in this case. It does not follow that, because the defendant was not then in default under the judgment, the judgment was not "still unsatisfied" within the meaning of the rule. A judgment is "still unsatisfied" until it is satisfied. Order XXV., r. 8, of the County Court Rules provides for default in payment under the judgment, and, upon the terms of that rule and other rules relating to default, it appears clear that a distinction is to be drawn between cases where there is a default under the judgment and cases where the judgment is merely unsatisfied. Attachment of debts in the county court is not execution in the proper sense of the term, though of course it is a method of procuring satisfaction of the judgment. No doubt, process could not have issued against the person or goods of the defendant upon the judgment before the time given for payment had elapsed, but the same rule does not necessarily apply to garnishee proceedings. The reason why it is provided that time should be given for payment in county court judgments obviously is that it is given in mercy to debtors of the class usually sued in county courts, and to prevent, if possible, their furniture being seized and their homes broken up. The same reason does not apply in the case of garnishee proceedings. In the case of county courts, the judge often does not sit from day to day, and a considerable interval may elapse before his next sitting at the same place. The idea embodied in the provisions of the rule may probably have been that the summons under Order XXVI., r. 1, might be issued, irrespective of whether there had then been default or not, and the hearing would not come on before the judge till after the time for payment of the money payable under the judgment had elapsed; and the judge under rr. 12 and 14 of Order XXVI. would have ample power to see that no injustice was done to the judgment debtor by making the judgment creditor pay the costs, if he thought that the garnishee proceedings had been taken unnecessarily or oppressively.

*Farleigh*, for the defendant, was not called upon to reply.

VAUGHAN WILLIAMS L.J. The procedure in the county courts as defined by the Acts relating to those Courts and the rules

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Vaughan Williams L.J.

made from time to time under those Acts appears to me to have always kept in view the object of the earliest of those Acts, which, if I remember rightly, were called Acts for the recovery of small debts. But, be that as it may, the county courts have in the exercise of their jurisdiction always been largely occupied with cases involving small debts, and arising between persons of small means. I think one may see how far this fact has been acted upon when one has regard to the differences in relation to the form of judgments between the procedure in the High Court and that in the county court. I think that all the procedure as to judgment in the county court is based on the assumption that to allow a judgment in that Court to be executed immediately, and to insist on the form of a judgment always being such that the whole judgment debt became immediately payable, would operate very harshly on a class of persons who are often short of money and depend for their daily food upon money coming to them from day to day. People of that kind often depend for their living on sums of money coming to them which are paid periodically. That being so, one sees that it is very reasonable that in such cases the form of the judgment should give fourteen days for payment of the money payable under it, unless a special order to the contrary is made, and that the county court judge should have power to order such money to be paid by instalments. Under these circumstances, and that being the history of the legislation on the subject, we have to construe the terms of Order XXVI., r. 1, of the County Court Rules. That rule lays down the procedure to be observed with regard to attachment of debts in the county court. It requires as a condition precedent to the entry of a plaint and the issue of a summons under the Order that there should be an affidavit by the judgment creditor or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount. Throughout their argument, the contention of the counsel for the plaintiffs has really been that all that is necessary to enable the judgment creditor to take proceedings under the Order is that he should shew that the *debt* is still unsatisfied. I think that contention is quite wrong. In my opinion it is plain that he has to satisfy the Court that the *judgment* is still unsatisfied. Having regard

to the terms of the judgment here, it seems to me impossible to argue that there had been any default in satisfying it, unless and until the time had arrived for payment of the sum thereby ordered to be paid. Under these circumstances I have no hesitation in saying that there had been no default in respect of the obligations imposed upon the judgment debtor by the judgment at the time when the garnishee summonses were issued, and there could not be any such default till the time had elapsed for payment of the money payable thereunder. As I understood the argument for the plaintiffs, it was not denied that, until that time had elapsed, execution could not issue against the defendant's chattels, but it was contended that, though that was so with regard to execution against the defendant's chattels, the same rule did not apply to attachment of debts. I gather the suggestion to be that this was, in truth, not execution at all, but merely a mode by which the judgment creditor obtained payment of the debt declared by the judgment to be due from the judgment debtor, and therefore the cases under the Common Law Procedure Acts which have been referred to, and which related to execution, had no application. I cannot agree with that suggestion. I think that garnishee proceedings are a species of execution, and that a judgment creditor ought not to be allowed to take out a garnishee summons, or get an order thereon, under Order XXVI., r. 1, if the state of things is such that he cannot issue execution against the judgment debtor's chattels. It was said that the fact that in s. 146 of the County Courts Act, 1888, which deals with executions, garnishee proceedings are not mentioned goes to shew that in the county court those proceedings are not to be regarded as being in the nature of execution. But the mere fact that they are not mentioned in that section does not affect my opinion that the judgment creditor ought not to be allowed to issue a garnishee summons, or to get an order thereupon, unless and until the time has elapsed within which the judgment is payable, and the judgment can, within the proper meaning of the words, be said to be "still unsatisfied." I do not think that the judgment can be said to be "still unsatisfied" so long as there has been no default by the judgment debtor in the performance of the

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obligation thereby imposed upon him. In my judgment this appeal should be allowed.

FARWELL L.J. I also am of opinion that this appeal succeeds. Order XXVI., r. 1, of the County Court Rules, and Order XLV., r. 1, of the Supreme Court Rules are to the same effect, except as regards certain matters of detail which are not material for the present purpose, the chief difference being that in the High Court a garnishee order nisi goes in the first instance, whereas in the county court a summons is first issued. Inasmuch, however, as it is admitted that, when the summons is served, it has the same effect as the garnishee order nisi, there is very little distinction in that respect. There is also another distinction which may have to be further considered in future. It has been held that, where there has been an order to pay a sum of money into Court in the Chancery Division, a garnishee order cannot be made attaching a debt to answer the sum so ordered to be paid in, as was explained in *In re Greer*. (1) I need not, however, pause here to consider that distinction further. The garnishee process in both the High Court and the county court is, in my opinion, intended to have the effect of process by way of execution of a judgment. It may not be execution in the strict technical sense, but the intention of Order XLV., r. 1, of the Supreme Court Rules was, as is pointed out in the Annual Practice for 1911, vol. 1, pp. 701, 702, to render property available for the purpose of satisfying a judgment for payment of money in all Divisions of the High Court, which before the Common Law Procedure Act, 1854, was not so available, and under that Act was only so available in the superior Courts of common law, and to bring debts due to the judgment debtor into the same position as his chattels for that purpose. Order XXVI., r. 1, of the County Court Rules is intended to have the same effect in the county court. In cases in the Chancery Division, such as *Farrer* v. *Lacy, Hartland & Co.* (2), where a mortgagee sues upon the covenant for payment of the mortgage debt in a mortgage deed, which he could not have done in Chancery in former days, the practice in that Division always

(1) [1895] 2 Ch. 217. (2) (1885) 28 Ch. D. 482.

has been to make an order for payment within a reasonable time, usually a month. In the county court the time usually given for payment is fourteen days. In both cases the order is not for immediate payment. No one has ever ventured to argue in the High Court that garnishee proceedings could be taken upon such an order for payment of money in the Chancery Division before the time given by the order for payment had elapsed. The same principle applies, in my opinion, to the case of a county court judgment, which is really an a fortiori case, the order in the county court being to pay the amount due under the judgment, not to the judgment creditor himself, but into Court, and that not immediately but within a certain time. By what process of reasoning it can be said that the judgment is still unsatisfied before that time has elapsed I cannot see. The word "still" in the rule appears to me to point to a period at which the judgment ought to have been, but was not, satisfied, but no such period had arrived in the present case. The judges in the Divisional Court seem to have thought that no hardship to the judgment debtor was involved in the view which they took. But it is plain that the service of the garnishee summons may have the effect of paralysing the efforts of the judgment debtor to obtain money for the purpose of satisfying the judgment. How can it be said that the judgment debtor is not prejudiced when, as in the present case, the debts garnished may amount to double the amount of the judgment debt, and the judgment debtor may have relied upon payment of those debts for the purpose of paying other creditors? It is said that, upon the proceedings under Order XXVI., r. 1, the county court judge has powers which would enable him to do justice to the judgment debtor in the matter if the proceedings were vexatious or oppressive. I do not see how that can be so, in case proceedings are taken against the judgment debtor by other creditors for the recovery of the debts which he has been rendered unable to pay. It is said that the power of the county court judge to dismiss the summons and award costs to the judgment debtor, if the garnishee proceedings were worthless or vexatious, shews that it was the intention under Order XXVI., r. 1, to give an immediate power of issuing a garnishee summons. I do not think that this is a

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legitimate argument, or that the words of the rule can be construed by reference to such considerations. We have to see whether any such power as is contended for is given by the rule. I do not see how it can be said that the judgment is "still unsatisfied" before the period has elapsed within which the money payable thereunder is ordered to be paid.

KENNEDY L.J. I am of the same opinion. The whole question seems to me to be whether or not it can be properly said in such a case that a judgment had been recovered which was "still unsatisfied" at the time when the garnishee proceedings were taken. Unless that statement could rightly be made at the time of the application under Order XXVI., r. 1, the judgment creditor could not properly make the affidavit which was a condition precedent to any proceedings under that rule. Like my brother Farwell, I cannot see how, if a judgment orders the payment of a sum of money on a certain date, it can rightly be said according to the fair meaning of the words that the judgment is "still unsatisfied" before that date, it being quite as much a judgment that the money shall be paid before a defined date as that it shall be paid at all. The provisions of Order XXVI., r. 1, of the County Court Rules, though in certain special features modified so as to be appropriate to the procedure in the county court, are in substance the same as those of Order XLV., r. 1, of the Rules of the Supreme Court. The effect of these rules is that, where any money is owing to the judgment debtor, by means of the proceedings thereby provided, that money can be so effectively reached by the judgment creditor that, pending the final decision of the Court, the garnishee cannot pay any part of the debt to the judgment debtor. I think that it cannot have been clearly brought to the notice of the Divisional Court, or of the county court in this case, what a hardship might be occasioned to a judgment debtor, if, in the case of a judgment the amount of which is not payable by him for some time, immediately after the judgment is pronounced proceedings can be taken for the garnishment of debts due to the judgment debtor, by means of which he may actually be prevented from satisfying the judgment. But, whatever may or may not be the results of either construction of the rule, we have

to see what the terms of it allow to be done. According to its terms the whole proceeding is to be based upon an affidavit that the judgment is "still unsatisfied." How can that rightly be made when the judgment is not yet due to be satisfied? The learned county court judge seems to have considered that attachment of debts was not, properly speaking, in the nature of execution. With all respect to him I cannot follow that view. In my opinion it is in its nature essentially a method of execution. It is one of the kinds of execution which is contemplated in Order XLII. of the Supreme Court Rules. It is one method of enforcing a judgment for payment of a sum of money. The question is, what is the fair meaning of the words of Order XXVI., r. 1? It is no argument, I think, to say that, upon the view contended for by the plaintiffs, the county court judge can find some way of working out the rule so as not to do injustice to the judgment debtor; the question is whether under the terms of the rule there was jurisdiction to allow these summonses to be issued, and for the reasons which I have given I am of opinion that there was not such jurisdiction.

*Appeal allowed.*

Solicitors for plaintiffs: *Watkins & Pulleyn.*
Solicitors for defendant: *Ralph Raphael & Co.*

E. L.

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*April 6.*

## McINALLY *v.* BLACKLEDGE and Others.

*County Court—Appeal from Decision of Registrar sitting by Request of Judge as Deputy Judge—Consent of Parties—Registrar not Barrister of Seven Years' Standing—Plaintiff's Claim above 2l.—Validity of Appointment of Registrar as Deputy Judge—County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 18.

In an action brought in the county court where the claim exceeds 2*l.* the county court judge has no power even with the consent of the parties to appoint as his deputy for the purpose of hearing the action in that capacity a person who is not a barrister of seven years' standing as required by s. 18 of the County Courts Act, 1888.

Appeal from a judgment of the registrar of the Lancashire County Court holden at Chorley.

The action was brought in the county court to recover from the defendants three guineas for damages for wrongfully entering the plaintiff's land and cutting, pulling down, and removing and destroying a timber fence there erected, together with a number of privet bushes.

The county court judge orally requested the registrar (who was not a barrister of seven years' standing) to sit as his deputy, and the parties consented. The registrar accordingly heard the case, purporting to sit as deputy county court judge. He gave judgment for the defendants upon the ground that the fence and privet bushes were not upon the plaintiff's land.

The plaintiff appealed. The notice of appeal stated that the plaintiff appealed from "the judgment of the registrar . . . . sitting by request of the judge . . . . as his deputy, and with the consent of the parties to the . . . . action."

*Compton Smith*, for the defendants. There is a preliminary objection to the hearing of this appeal. As the registrar was not a barrister of seven years' standing, the county court judge had no jurisdiction to appoint him as deputy judge, the requirement of s. 18 of the County Courts Act, 1888 (1), not having been

(1) County Courts Act, 1888, s. 18: "In case of the illness or unavoidable absence of any judge it shall be lawful for such judge to appoint a barrister-at-law of at least seven years' standing to act as his deputy

complied with. The registrar was not acting under s. 92 of the Act of 1888, as the action was for a sum exceeding 2*l*. The decision in *Pearce* v. *Winkworth* (1) shews that the parties must conform to the practice of the Court. [The County Courts Act, 1888, ss. 25, 26, 104, 120, and 124, and the County Court Rules, 1888, Order XX., r. 1, were also referred to.]

*C. F. Bovill*, for the plaintiff. The registrar was in law the judge. The judge requested him to sit, and the parties consented. There is nothing in the County Courts Act, 1888, to prevent the parties, by their consent, giving jurisdiction to the registrar to be the mind and the voice of the judge. As the action involved a question of title to land there was an appeal as of right under s. 120.

[PHILLIMORE J. Your notice of appeal is given as being from the judgment of the registrar, not from that of the judge.]

In the absence of any prohibition in the County Courts Act, 1888, there is no reason why the parties should not consent to the registrar having jurisdiction. The provision contained in s. 18 as to the deputy being a barrister of seven years' standing is for the protection of the parties, and they can waive it: *Ashton* v. *Lancashire and Yorkshire Railway.* (2)

[PHILLIMORE J. I do not see how parties can by consent confer a judicial office.]

If an appeal does not lie, great difficulties in conducting business in county courts will arise, as, although the pressure of work upon the judge may be very great, parties will not consent to relieve him by allowing the case to be heard by the registrar if there is no appeal from the decision. [*Buckley* v. *Edwards* (3) was also referred to.]

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during such illness or unavoidable absence; . . . . Every deputy appointed under this section, during the time for which he shall be so appointed, shall have all the powers and privileges and perform all the duties of the judge for whom he shall have been so appointed."

Sect. 92 provides that, subject to rules and orders under the Act, a registrar may, on the application of the parties and by leave of the judge, hear and determine any disputed claim where the sum claimed or amount involved does not exceed 2*l*.

(1) (1873) 28 L. T. 710.

(2) [1904] 2 K. B. 313.

(3) [1892] A. C. 387.

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PHILLIMORE J. This appeal must be dismissed with costs.

HORRIDGE J. I agree.

*Appeal dismissed.*

Solicitors for appellant: *Gibson & Weldon, for D. M. & T. Aspden, Chorley.*

Solicitors for respondents: *Rawlings & Butt, for J. H. Neville, Chorley.*

J. E. A.

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*May* 1, 18.

[IN THE COURT OF APPEAL.]

## THE KING *v.* SPECIAL COMMISSIONERS OF INCOME TAX.

### *Ex parte* ESSEX HALL.

*Revenue—Income Tax—Trustees for Charitable Purposes—Allowances—Rents and Profits—Income Tax Act*, 1842 (*5 & 6 Vict. c. 35*), *Sched. A, s. 61, No. VI.*

Trustees for charitable purposes, or a charitable corporation, not being a college or hall, hospital, public school or almshouse, are not entitled to the allowances for income tax under Sched. A given by s. 61, No. VI., of the Income Tax Act, 1842, in respect of lands, tenements, hereditaments or heritages in their own occupation not producing rents.

Sums received by the trustees for the use of the property and wholly expended in its upkeep are not "rents and profits" within the meaning of this section.

*Maughan* v. *Free Church of Scotland*, (1893) 30 Sc. L. R. 666, followed and approved.

APPEAL from the decision of a Divisional Court (Lord Alverstone C.J., Hamilton J., and Avory J.) which raised the question whether trustees for charitable purposes were entitled to the allowance for income tax under Sched. A given by s. 61, No. VI., of the Income Tax Act, 1842, in respect of hereditaments in their own occupation not producing rent. (1)

(1) The material portions of s. 61 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), are as follows:—

"No. VI.—Allowances to be made in respect of the said duties in Schedule (A)."

"For the duties charged" on colleges and halls in the universities:

"Or on" hospitals, public

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REX v. SPECIAL COMMISSIONERS OF INCOME TAX. ESSEX HALL. *Ex parte.*

Essex Hall was incorporated under the Companies Acts, 1862 to 1883, in August, 1886, as a company not trading for profit, the word limited being omitted by licence of the Board of Trade. The objects for which the company was established were (inter alia) "to provide accommodation for and promote the objects of the British and Foreign Unitarian Association and the Sunday School Association."

The company owned the freehold of a building known as Essex Hall, situate in Essex Street, Strand. This building was assessed for income tax under Sched. A at 400*l*., on which income tax had been paid for the years ending April 5, 1907, 1908, and 1909.

The building was occupied and used by the British and Foreign Unitarian Association and the Sunday School Association, except one room which was let to and occupied by the Inquirer Publishing Company, Limited, at a rent of 50*l*. per annum, the associations paying 75*l*. and 18*l*. 10*s*. respectively. It also appeared that the two large rooms or halls, when not required by the associations, were let on hire for the purposes of public meetings, conferences, arbitrations, and similar purposes, and the amount so received went in reduction of the larger rents which the company would otherwise have been obliged to demand from the associations.

The income derived from the building from all sources amounted during the years 1906, 1907, and 1908 to 433*l*., 489*l*., and 435*l*. respectively.

The income derived from the building was expended by the company in lighting and heating the building, caretaker's wages,

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schools, almshouses, and literary institutions:

"Or on the rents and profits of lands, tenements, hereditaments or heritages belonging to any hospital, public school or almshouse or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes:"

"The said last mentioned allowances to be granted on proof before the Commissioners for Special Purposes of the due application of the said rents and profits to charitable purposes only, and in so far as the same shall be applied to charitable purposes only."

Sect. 62 provides that the Special Commissioners are to certify allowances granted under No. VI, Sched. (A), and order payment thereof.

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rates and taxes, insurance and repairs, which last item varied in different years. The expenditure under the above heads during the years 1906, 1907, and 1908 was 399*l.*, 430*l.*, and 616*l.* respectively. Over a period of some years income and expenditure practically balanced.

Application was made to the Special Commissioners for Purposes of Income Tax for a certificate of allowance and an order for repayment under s. 62 of the Income Tax Act, 1842, in respect of the payments made for the three years ending April 5, 1909. The Special Commissioners repaid the income tax for the said three years in respect of the one room let to the Inquirer Publishing Company, Limited, for 50*l.* per annum, but refused to make any further repayment, on the ground that no legal exemption existed in favour of trustees for charitable purposes in respect of income tax paid in respect of premises occupied by them.

After some correspondence the company obtained a rule nisi to shew cause why a writ of mandamus should not issue to the Special Commissioners commanding them to allow the exemption from Sched. A of the Income Tax Act, 1842, claimed by Essex Hall and to give a certificate thereof together with an order for repayment under s. 62 of the said Act.

This rule came on for argument before a Divisional Court consisting of Lord Alverstone C.J., Hamilton J., and Avory J., who on January 12, 1911, held (Avory J. dissenting) that Essex Hall, whether they were in occupation or not, were entitled to the allowance given by s. 61, No. VI., of the Income Tax Act, 1842, on the said rents and profits so far as the same were applied to charitable purposes. The rule was therefore made absolute.

The Special Commissioners appealed. The appeal was heard on May 1.

*Sir Rufus Isaacs*, *A.-G.*, and *W. Finlay*, for the appellants. For the purposes of this appeal, it is admitted that the objects of this company are charitable, and that the buildings are used for charitable purposes, but there is no legal exemption in favour of trustees for charitable purposes from income tax paid in respect of premises occupied by them. Essex Hall are the

owners and occupiers of this building, and as occupiers are not entitled to any exemption: *Maughan* v. *Free Church of Scotland.* (1) This case seems exactly in point.

All the judges in the Divisional Court were of opinion that Essex Hall were the occupiers here, but the majority were of opinion that the decision in *Maughan* v. *Free Church of Scotland* (1) was inconsistent with the later decision in *London County Council* v. *Attorney-General.* (2) That case, however, does not deal with the present question, and no inference can fairly be drawn from that decision which in any way overrules *Maughan* v. *Free Church of Scotland.* (1) That this is so seems clear from *Attorney-General* v. *London County Council.* (3)

If trustees, as here, are themselves in occupation there is nothing in No. VI. to give them an allowance unless the words "rents and profits" can be read as equivalent to annual value, and on this point *Maughan* v. *Free Church of Scotland* (1) is a clear decision in favour of the Crown. [They also referred to *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (4)]

The sums raised by the company, which were all expended in the upkeep of the building, are not rents and profits of the property within the meaning of this exception.

*Danckwerts, K.C.*, and *R. M. Montgomery*, for the respondent. *Maughan* v. *Free Church of Scotland* (1) is distinguishable: in that case the words "so far as the same are applied to charitable purposes" were not under consideration because no rents and profits were received from the hall in that charity. In any event that case cannot stand after the decision in *London County Council* v. *Attorney-General.* (2)

The words "the same" refer not to the rents, but to the lands, and relate to or at any rate include the case of lands which are not let and do not produce rents, but are lands applied to charitable purposes.

An exemption of this kind must be construed in favour of the public if possible: *The King* v. *Special Commissioners for Income Tax.* (5) The allowance given by s. 61, No. VI., in

(1) 30 Sc. L. R. 666.
(2) [1901] A. C. 26.
(3) [1907] A. C. 131.
(4) [1891] A. C. 531, at p. 589.
(5) (1908) 98 L. T. 446; (1909) 100 L. T. 585.

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respect of rents and profits from property vested in trustees for charitable purposes extends to all profits. Beneficial occupation of the property is a profit: "profits" are something more than rents and include beneficial occupation and any other benefit arising from the hereditaments. The allowance ought to be made whether the trustees are in occupation or not.

Essex Hall is not in fact in the occupation of the company. What is received, if anything, is "rents and profits." The substance of the present arrangement is equivalent to a lease to these associations, in which case an allowance would be a matter of course.

*W. Finlay* replied.

*Cur. adv. vult.*

May 18. COZENS-HARDY M.R., after stating the nature of the appeal, continued:—Essex Hall is a corporation, the objects of which are for the present purpose admitted to be charitable. It is the owner of Essex Hall, a building consisting of a considerable number of rooms, most of which are in fact used by or for the purposes of the British and Foreign Unitarian Association and the Sunday School Association, both associations being charities in the view of the law.

Some income is received from occasional lettings for meetings, and otherwise, and varying sums are paid by the associations so as practically to balance the income and receipts, but the whole building, with the exception of a small part let to the Inquirer Publishing Company, Limited, as to which no question arises, is under the sole management and control of Essex Hall. Essex Hall is rated as the occupier. It is assessed at 400*l.* a year as being the annual value of the property. Income tax under Sched. A was paid by Essex Hall, and a claim has been made for the return of the amount so paid on the ground that the case falls within s. 61, No. VI., of the Income Tax Act, 1842. Before considering the precise terms of that section, it is right to state that the whole claim made and all the proceedings taken are based upon the footing that Essex Hall are the occupiers as well as the owners of this property.

The short point for our decision is this. Is a charitable

corporation, not being a college or hall, or hospital, public school, or almshouse, entitled to exemption in respect of property not let but in its own occupation? It is remarkable that the first limb of the exemption clause applies only to certain specific charities, of which this is not one, and that charities, other than those specially mentioned, can only claim allowance "on the rents and profits of lands, tenements, hereditaments, or premises belonging to or vested in trustees for charitable purposes so far as the same are applied to charitable purposes."

Now, as a matter of construction, I think the final words, "so far as the same are applied," refer to the rents and profits and not to the lands or buildings, and that it is irrelevant to say that the actual enjoyment of the property itself is taken by two charities, namely, the two associations, both of which are charitable. The exemption in question applies only to a case where charity trustees, or a charitable corporation, let their property to a tenant and receive rents and profits in respect of such letting. This was the view taken by the Court of Session in *Maughan* v. *Free Church of Scotland* (1) in the year 1893, and I am glad to have the opinion I have formed confirmed by such high authority. In my view it makes no difference that certain sums have in the present instance been received by the trustees. Sums so received were not rents and profits of the land within the meaning of the Act.

I agree with the judgment of Avory J. I am unable to follow the argument which seems to have impressed the Lord Chief Justice and Hamilton J., that the recent decisions of the House of Lords in the London County Council cases (see *London County Council* v. *Attorney-General* (2) and *Attorney-General* v. *London County Council* (3)) have in any way affected the decision in the Scotch case. With great respect to the majority of the Divisional Court, I think this appeal must be allowed.

To avoid misapprehension, I wish to make it clear that my decision depends upon the form in which the question arises before us, and that it may well be that, if steps are taken for letting definite portions to either or both of the associations so

(1) 30 Sc. L. R. 666; 3 Tax Cases, 207. (2) [1901] A. C. 26.
(3) [1907] A. C. 131.

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as to make them occupiers of such definite portions and a new assessment is made, a partial, although not a complete, allowance may be obtained in the future by Essex Hall.

BUCKLEY L.J. It is with extreme reluctance that I find myself constrained to concur in the opinion that this appeal must be allowed. The question is one of the construction of the Act of Parliament, and although, as I shall point out, the construction for which the Crown contends is one which leads to results which seem to me incongruous and improbable, yet I have to construe the Act of Parliament and give effect to the meaning of the words as I find them.

The clauses as to allowances which follow s. 61 of the Act of 1842, and which are to be found under the head "No. VI. Allowances to be made in respect of the said duties in Schedule A," are, I think, to be read as follows: In the first clause the words "college or hall" mean collegiate authority, and refer to the person who is to be assessed. That clause provides that allowance is to be made for the duties charged on a collegiate authority in respect of the public buildings of the college not occupied by individual members or by any person paying rent for the same. It is an exemption in respect of buildings belonging to and not producing rent to the collegiate authority. The second clause relates to hospitals, public schools, or almshouses, and for brevity selecting one of them, say the hospital, that clause provides that allowance shall be made for the duties charged on any hospital authority in respect of premises belonging to the hospital authority in terms similar to those in the previous clause as regards collegiate authorities. The third clause (taking again the case of the hospital) is, I think, to be read as providing that allowance is to be made to the hospital authority in respect of rents and profits of lands belonging to the hospital authority so far as the same (that is to say the rents and profits) are applied to charitable purposes. Mr. Danckwerts argues that the words "the same" refer to not the rents but the lands, and relate to or at any rate include the case of lands which are not let and do not produce rents, but are lands applied to charitable purposes. I think this contention inadmissible. I think the thing

to be applied here is money arising from the rents as to which the Commissioners are to investigate whether or not they have been applied to charitable purposes. Thus understood the second clause relates to lands of the hospital which do not and the third clause to lands of the hospital which do produce rents. The second clause will include lands which are and the third clause lands which are not in the occupation of the hospital. There may, however, be lands of the hospital which do not produce rent and which are in the occupation of the hospital, not because they require them for the purposes of the charity, but because they cannot find a tenant. In the case of a hospital these would seem to fall within the second clause and the hospital would be able to claim exemption upon all the three classes of lands.

The third clause, however, includes for the first time a new owner not previously mentioned, namely, trustees for charitable purposes. As regards this owner, he does not fall within the second clause, and upon the strict language of the Act can claim an allowance only in respect of rents and profits of lands vested in him so far as the same are applied to charitable purposes. If the trustees are themselves in occupation there is no clause to give them an allowance, unless the words "rents and profits" can be read as equivalent to annual value. It is true that the words "rents and profits" are from time to time used in the Act as words describing the subject-matter of income tax, and that it is the annual value of land which is the subject of income tax, and that the title of the statute is "An Act for granting duties on profits arising from property," but it is impossible, I think, in this third clause to read rents and profits as equivalent to annual value. The context in which the words are found deals with them as something as to which proof is to be adduced that the rents and profits have been applied in a particular manner, namely, for charitable purposes only. Annual value is but an hypothetical sum arrived at in a certain manner. It is not cash or value capable of being applied in the manner mentioned. This is the view which was taken I think in Scotland in *Maughan* v. *Free Church of Scotland* (1), and I

(1) 30 Sc. L. R. 666; 3 Tax Cases, 307.

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am glad to be able to arrive at a conclusion which adopts the same meaning in a Revenue case, as it is certainly desirable that the decisions upon such a subject should be in agreement in the different parts of the United Kingdom. I conclude, therefore, that trustees for charitable purposes are not entitled to an allowance in respect of lands in their own occupation not producing rents.

I cannot forbear pointing out the extraordinary results to which this conclusion leads. Suppose that trustees for charitable purposes being the owners of Blackacre demise it for a term of years to a lessee who pays a rent, and that the trustees prove that the rent is applied to charitable purposes, they will be entitled to allowance. Suppose that upon the expiration of that lease the trustees cannot find a new tenant, that they go into occupation of the land themselves and farm it for the time being and use the proceeds in assisting in the maintenance of the persons maintained in their charitable institution, it results that the trustees will be assessable on the annual value and can claim no allowance. Such a conclusion is repugnant to common sense. Further, it results from adopting the contention of the Crown that the incidence of taxation depends not upon the substance but upon the form of the transaction. If this charity (Essex Hall) now grant leases to the British and Foreign Unitarian Association and the Sunday School Association respectively, or enter into an agreement under which those societies pay rents and become occupiers, and Essex Hall apply the rents thus received in the charitable purpose of relieving those charitable associations from the cost of warming, lighting, caretaking, repairing, and so on, Essex Hall will, so far as I see, be entitled to an allowance.

I, however, am not concerned with consequences, but with construction, and upon construction it seems to me that the words of the third clause do not fit the present case, and that consequently the allowance cannot be made. A subsidiary question was mentioned, namely, whether Essex Hall are entitled in respect of the sums received for casual lettings to the same allowance as has been conceded in respect of the rent received from the Inquirer Publishing Company. But this is not the

subject of the appeal before us and I say no more about it. I regret that the appeal must be allowed.

KENNEDY L.J. In this case I have little to add to the judgments delivered by the Master of the Rolls and Buckley L.J., which I have had an opportunity of perusing.

I concur in the judgment delivered by Avory J. in the Divisional Court; and, but for the judgments by the Lord Chief Justice and Hamilton J., from whom Avory J. differed, I should have thought that there was not any great difficulty in the case. Nor do I see any real hardship, if hardship were a legitimate matter for consideration, in the consequences which, it is said, follow from adopting the view presented to us by the appellants. The third head of allowance under Sched. A, No. VI., is an allowance in respect of duties charged "on the rents and profits of lands, tenements, hereditaments or heritages belonging to any hospital, public school or almshouse or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes." This is, as I read s. 61, an allowance in respect of duties chargeable under Sched. A, No. II., r. 6, upon "profits arising from lands, tenements, hereditaments or heritages not in the actual possession or occupation of the party to be charged." The charge is in respect of property in the lands, tenements, &c., that is, the ownership as opposed to the occupation. The limited company called Essex Hall are the occupiers of the premises in question. They are also the owners, and have been assessed for income tax in respect thereof under Sched. A on the annual value. But it is as occupiers that they make profits out of the premises by making contracts with certain persons for the use of parts of them from time to time for public meetings and similar purposes. I find no justification in the terms of the Act for treating, as the respondents ask us to do, an assessment on the annual value of lands, &c., in the actual occupation of the owner, as so far identical with an assessment upon the profits of lands, &c., derived by the owner from the occupation of that property by another, as to make an allowance which is expressly authorized by this third head of Sched. A, No. VI., in certain specified circumstances, only in respect of

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the charge upon rents and profits of lands, &c., claimable, by implication, in respect of an assessment upon annual value. And further, as I am inclined to think, the profits made in the present case by Essex Hall, the occupying owners, from use of parts of the premises are really not in their nature "rents or profits of lands, &c.," within the meaning of this allowance clause, but rather profits of a business, a business of letting furnished or partly furnished rooms, carried on by the occupier in the premises.

In regard to the authorities referred to in the judgments of the Lord Chief Justice and Hamilton J. in the Divisional Court and again in the arguments in this Court, I have to add only that, in my opinion, the Scotch case is, as I understand to be the view also of the Lord Chief Justice, favourable to the contention of the appellants; and that there is no inference to be drawn from the reasoning or the decision of the House of Lords in *London County Council* v. *Attorney-General* (1) which detracts from or modifies the value of the authority of the Scotch case. An assessment upon "annual value" may, for certain purposes, be treated, in applying the Income Tax Acts, as an equivalent for an assessment upon "gains and profits"; but they are not simply synonymous or interchangeable expressions; and the allowance claimed by the respondents is by the language of the statute which grants the allowance an allowance in respect of duties charged upon the "gains and profits" of lands, &c., and not upon "annual value," which is not an actual but an hypothetical sum.

*Appeal allowed.*

Solicitors: *Solicitor for Inland Revenue; W. S. Sharpe.*

(1) [1901] A. C. 26.

W. C. D.

## GEORGE *v.* DAVIES.

1911
*April* 26.

*Master and Servant—Domestic Servant—Determination of Service—Custom—Notice during First Fortnight—Determination at End of First Month—Servant leaving Service in Breach of Contract—Right to Wages accrued due.*

The plaintiff, a domestic servant, entered the defendant's service on November 3, 1910, at yearly wages payable monthly, there being no express agreement as to notice. On November 17 she gave notice to leave at the expiration of the first month of her service. She accordingly left on December 3, and upon the defendant refusing to pay her the wages for the month during which she had been in the service, upon the ground that she had left without giving one month's notice, she brought an action in the county court to recover the month's wages, alleging a custom that either party to the contract of the hiring of a domestic servant was entitled, in the absence of special agreement as to notice, to determine the service at the end of the first month by notice given at or before the expiration of the first fortnight. The plaintiff called no evidence in support of the custom. The county court judge said that he had taken judicial notice of the custom in previous cases, and he would take judicial notice of it in this case. He accordingly gave judgment for the plaintiff for the amount claimed:—

*Held*, that the county court judge was entitled to take judicial notice of the custom; and further that, apart from the custom, and assuming that the plaintiff wrongfully left the defendant's service, she was entitled to recover the month's wages which had already accrued due to her.

*Moult* v. *Halliday*, [1898] 1 Q. B. 125, discussed.

Appeal from the Bloomsbury County Court.

The action was brought in the county court to recover 1*l.* 18*s.* 4*d.*, being the amount of one month's wages alleged to be due to the plaintiff. On November 3, 1910, the plaintiff entered the service of the defendant as a domestic servant at the yearly wages of 23*l.*, payable monthly. No express agreement as to notice was made. On November 17 the plaintiff gave the defendant notice that she would leave the service on December 3. She accordingly left the defendant's service on December 3, and upon the defendant refusing to pay her the wages for the month during which she had been in the service, upon the ground that she had broken her contract by leaving without giving one month's notice, she brought this action to recover the amount. At the trial it was contended on behalf of

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the plaintiff that a custom existed whereby either party to the contract of the hiring of a domestic servant was entitled, in the absence of special terms as to notice, to determine the service at the end of the first calendar month by notice given at or before the expiration of the first fortnight of the service. No evidence in support of this alleged custom was given, but the county court judge (Judge Bacon) said that he had taken judicial notice of the custom in previous cases, and he would take judicial notice of it in this case. He accordingly held that the service had been properly determined and gave judgment for the plaintiff for the amount claimed. The defendant by leave appealed.

*Lort-Williams*, for the defendant. In the absence of evidence of the alleged custom that either party may terminate the contract of service at the end of the first month by notice given at or before the expiration of the first fortnight the county court judge was not entitled to take judicial notice of it. Such a custom is not so well known and understood that the Courts will take judicial notice of it, but when it is relied upon it must be proved by evidence in each case: *Moult* v. *Halliday* (1); *Ex parte Powell, In re Matthews.* (2) Moreover, the county court judge did not say that he had had the custom proved before him by evidence in previous cases, but that he had taken judicial notice of the custom in previous cases; and if he did that without evidence of the custom he was wrong.

There being no such custom proved, the plaintiff committed a breach of her contract by leaving the defendant's service without giving one month's notice, and therefore she forfeited all wages for that part of the current year during which she had served: Smith on Master and Servant, 6th ed., p. 57; though in Macdonell on Master and Servant, 2nd ed., p. 185, it is said that "where a servant is discharged for a valid reason before the expiration of the time for which he was engaged, he cannot recover the value of services which he has rendered under the contract . . . . Of course a servant does not forfeit wages which are due but not paid." By a long and well-established custom

(1) [1898] 1 Q. B. 125. (2) (1875) 1 Ch. D. 501.

the hiring of domestic servants is for a year subject to determination on a month's notice by either master or servant or on payment of a month's wages by the master: Macdonell on Master and Servant, 2nd ed., p. 138. The hiring being for a year, the plaintiff forfeited all wages during the current year by wrongfully leaving the defendant's service, and therefore forfeited the wages for the first month during which she served. The judgment of the county court judge was wrong.

[LORD COLERIDGE J. referred to *Cutter* v. *Powell.* (1)]

The plaintiff did not appear.

BRAY J. In my opinion this appeal fails. The action was brought in the county court by a domestic servant against her mistress to recover one month's wages. The plaintiff at the expiration of the first fourteen days of her service gave the defendant notice that she intended to leave at the expiration of the first month of her service, and she accordingly left the defendant's service at the end of the month, thus having served one complete month. The defendant having refused to pay the amount of the month's wages, the plaintiff brought this action to recover that amount. At the trial the plaintiff relied upon a custom that either party in the case of a contract for the engagement of a domestic servant may terminate the contract of service at the end of the first month by giving notice to that effect at or before the expiration of the first fortnight of the service. The county court judge was asked to take judicial notice of that custom and to act upon it. The judge, who has been a county court judge for many years and who must have had great experience of these cases, which almost necessarily, owing to the smallness of the sums claimed, are brought in the county court, said that he had in previous cases taken judicial notice of the custom, and he would take judicial notice of it in this case. I cannot say that the judge was wrong in so doing. A time must come when a county court judge, having had the question of the existence of this custom before him in other cases, is entitled to say that he will take judicial notice of it, and will not require it to be proved by

(1) (1795) 6 T. R. 320; 2 Sm. L. C., 11th ed., p. 1.

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evidence in each case. In *Moult* v. *Halliday* (1) evidence was called in support of the custom, but the county court judge came to the conclusion upon the evidence that the custom was not proved, and he gave judgment for the defendant. Upon appeal it was contended that the judge was bound to take judicial notice of the custom. This Court held that the question whether the custom was proved was a question of fact, upon which the county court judge's decision was final, and upon that ground alon they dismissed the appeal. That case was decided over thirteen years ago, and, as I have said, when this custom is continually being put forward and proved by evidence, a time must come when a judge may say that he no longer requires it to be proved, but that he will take judicial notice of it. I cannot say that the judge was wrong in taking judicial notice of the custom, and therefore that point fails.

One other contention was urged on behalf of the defendant, upon the assumption that no such custom as is alleged existed. It is said that when a servant breaks her contract by leaving her service without giving proper notice she forfeits all wages which have accrued due to her. I do not agree with that contention. I gather that it was admitted that the wages were payable monthly. At the expiration of the first month one month's wages had accrued due to her, and she had then a vested right to be paid those wages, and could have sued for them. If she subsequently committed a breach of her contract of service by leaving without giving proper notice she would not forfeit the wages which had already accrued due to her, though her master might have a cross-claim against her for damages for breach of contract. We are not asked to give effect to any such cross-claim; we are only asked to set aside the judgment for the plaintiff. Upon both grounds the appeal must be dismissed.

LORD COLERIDGE J. I am of the same opinion. The county court judge, after having had many of these cases before him, considered that he had a right to take judicial notice of the custom which the plaintiff alleged. There must come a time when in such circumstances a judge is entitled to take judicial notice of

(1) [1898] 1 Q. B. 125.

the custom. *Moult* v. *Halliday* (1) is a very different case from the present. There the county court judge came to the conclusion that the custom had not been proved, and this Court held that the question was one of fact for the judge and that they could not interfere with his finding. The county court judge was, in my opinion, entitled to take judicial notice of the custom. Apart, however, from that, the plaintiff is entitled to recover the month's wages. There is a very old authority that she is entitled to recover. So long ago as 1795 it was held in *Cutter* v. *Powell* (2) that if a sailor hired for a voyage took a promissory note from his employer for a certain sum provided he proceeded, continued, and did his duty on board for the voyage, and before the arrival of the ship he died, no wages could be claimed, even for the period during which he had served, either on the contract or on a quantum meruit. But Lawrence J. in his judgment distinguished that case from the hiring of an ordinary servant, saying that "with regard to the common case of a hired servant, to which this has been compared, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year." That statement was based upon the assumption that a hiring of a servant was for a year. In the present case the wages were payable monthly, and the plaintiff had served for a month, and therefore one month's wages were due to her, for which she sued in this action. The defence set up is that she broke her contract by leaving the service without giving one month's notice, and that therefore she is not entitled to recover any wages for the month she has served. In my opinion, that would not deprive her of the right to recover the month's wages which had already accrued due to her, though it might give rise to a cause of action in the master for damages for breach of contract.

*Appeal dismissed.*

Solicitors for defendant: *Maddison, Stirling, Humm & Davies.*

(1) [1898] 1 Q. B. 125.

(2) 6 T. R. 320; 2 Sm. L. C., 11th ed., p. 1.

W. F. B.

1911
*May* 17.

## THE KING *v.* MARTIN.

*Criminal Law—Summary Convictions—Several Offences—Power of Justices to pass Consecutive Sentences—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 25.

Although, upon the authority of *Reg.* v. *Cutbush*, (1867) L. R. 2 Q. B. 379, justices, before whom a defendant is at one and the same time convicted of several distinct offences, have jurisdiction under s. 25 of the Summary Jurisdiction Act, 1848, to pass two sentences to run consecutively, they have no jurisdiction to pass more than two consecutive sentences.

Certiorari to justices of St. Helens.

The applicant, James Henry Smythe, was on September 30, 1910, charged before a Court of summary jurisdiction at St. Helens upon six separate charges: (1.) that of obtaining by false pretences certain goods and a sum of 264*l.* 4*s.* 2*d.* from Harry Thewlis and William Stoddart; (2.) obtaining by false pretences the sum of 75*l.* from Harry Thewlis; (3.) obtaining by false pretences the sum of 100*l.* from William Wilson Crompton; (4.) obtaining by false pretences the sum of 37*l.* from Joseph Wilcock; (5.) obtaining by false pretences the sum of 5*l.* from Lawrence Wall; and (6.) obtaining by false pretences the sum of 20*l.* 10*s.* from William Bolton. The applicant pleaded guilty to all the six charges, and was convicted and sentenced to six months' imprisonment with hard labour on each of the first two charges, and to three months' imprisonment with hard labour in respect of each of the other four, the sentences being directed to run consecutively and amounting in the aggregate to two years' imprisonment with hard labour.

On March 16, 1911, the applicant obtained four rules for a certiorari to bring up the four last-mentioned convictions to be quashed upon the ground that the justices had no jurisdiction to pass consecutive sentences to take effect at the expiration of a sentence which was itself a consecutive sentence.

*Rowlatt*, for the justices, shewed cause. The justices had power to impose separate consecutive terms of imprisonment for the six offences of which the applicant was convicted. At

common law in case of indictable misdemeanours judges had this power of inflicting consecutive sentences—*Rex* v. *Wilkes* (1)—and apparently they might inflict as many such sentences as there were convictions before them. In *Gregory* v. *The Queen* (2) the defendant was convicted on four libels and sentenced to four consecutive terms of imprisonment. The count charging one of the four libels was held bad in the Court of Error and the sentence in respect of it was set aside, but the other three consecutive terms were upheld. Moreover in the case of misdemeanours it made no difference that the aggregate amount of the consecutive terms exceeded the maximum term allowed by law for the particular offence. Thus in *Castro* v. *The Queen* (3) two consecutive sentences of seven years each in respect of two perjuries, making in all fourteen years, were held good, notwithstanding that by statute seven years' imprisonment is the maximum penalty for perjury. In felonies, on the other hand, there could at common law be but one sentence, for the obvious reason that the only punishment which the law awarded for felony, namely, death, was in the nature of things incapable of repetition. Then in 1827, the death penalty having in the meantime been abolished in the case of the majority of felonies, the statute 7 & 8 Geo. 4, c. 28, s. 10, was passed "to give the Courts the same power in cases of felony as they had at common law in misdemeanour": per Blackburn J., *Reg.* v. *Cuthbush*. (4) By that section it was provided that "Wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime it shall be lawful for the Court to award imprisonment for the subsequent offence to commence at the expiration of the imprisonment to which such person shall have been previously sentenced." That section was uniformly construed by the judges as not being confined in its operation to cases in which the offender was actually in prison at the time of the second sentence, but as empowering them, "where more than one case of felony was established against a man and he was convicted of them at one and the same time, to make the sentence of imprisonment for the two or three

(1) (1770) 4 Burr. 2527, at p. 2574.
(2) (1850) 15 Q. B. 974.
(3) (1881) 6 App. Cas. 229.
(4) L. R. 2 Q. B. 379, at p. 381.

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offences, as the case might be, commence at the expiration of the sentence first awarded": see per Cockburn C.J., *Reg.* v. *Cutbush*. (1) Whether the Chief Justice there meant that the judges had claimed the power of inflicting more than two consecutive terms of imprisonment for felony is not clear. But it is to be observed that if Blackburn J. was right in saying that the object of the statute was to give the Courts the same power in felonies as they had in misdemeanours, then the Legislature must have intended them to have power to pass more than two consecutive sentences for felony. In 1848 the Summary Jurisdiction Act (11 & 12 Vict. c. 43) was passed, by s. 25 of which "Where a justice or justices of the peace shall upon any such information or complaint as aforesaid adjudge the defendant to be imprisoned and such defendant shall then be in prison undergoing imprisonment upon a conviction for any other offence . . . . it shall be lawful for the justice or justices . . . . to award . . . . that the imprisonment for such subsequent offence shall commence at the expiration of the imprisonment to which such defendant shall have been previously adjudged or sentenced." And in *Reg.* v. *Cutbush* (2) it was held that where the defendant is summarily convicted at one time of several distinct offences the justices have power under that section to award that the imprisonment under one or more of the convictions shall commence at the expiration of the sentences previously awarded. That decision covers the present case.

*Bodkin*, for the applicant, shewed cause. In the first place, s. 25 of the Act of 1848 has no application to such a case as the present. It only applies where the defendant is adjudged to be imprisoned "upon any such information or complaint as aforesaid," that is, for offences punishable upon summary conviction, which the offence in this case, that of obtaining money by false pretences, is not. It is an indictable offence, and previously to 1879 justices had no power to deal with indictable offences at all. They derive their only jurisdiction to deal with such an offence from s. 13 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), which provides that where an adult is charged with one of the indictable offences

(1) L. R. 2 Q. B. at p. 382. (2) L. R. 2 Q. B. 379.

specified in the First Schedule thereto (which schedule as amended by the 62 & 63 Vict. c. 22 includes the offence of obtaining money by false pretences), if he pleads guilty, they may adjudge him to be imprisoned for any term not exceeding six months. But the procedure in such a case is not under the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), but under the Indictable Offences Act (11 & 12 Vict. c. 42). But if s. 25 of the Act of 1848 does apply, it cannot in any view of that section authorize the infliction of more than two consecutive sentences. Even if a defendant who has just received a sentence of imprisonment can, while still within the walls of the Court, be said to "be in prison undergoing imprisonment" under that sentence, he cannot possibly be said to be so under a sentence the commencement of which is by its very terms suspended until a future date. And *Reg.* v. *Cuthush* (1) is no authority to the contrary. There the Court only awarded two consecutive terms of imprisonment. The defendant was convicted of four offences and sentenced to three months' imprisonment on each, but the first three sentences were directed to run concurrently, and the fourth was made to commence at the expiration of the first term of three months.

*Rowlatt* in reply.

LORD ALVERSTONE C.J. This case raises a question of very considerable importance. The applicant was charged before justices on six separate charges of obtaining money by false pretences. He pleaded guilty and was sentenced to two consecutive periods of imprisonment of six months each, and to four further consecutive periods of three months each, making in all a period of two years. The question raised by the rules is as to the power to impose the four last sentences.

Previously to the year 1879 justices had no jurisdiction to deal summarily with indictable offences, they had to send them for trial under the provisions of the Indictable Offences Act (11 & 12 Vict. c. 42). But by the Summary Jurisdiction Act, 1879, they were given such a power. By s. 12 of that Act it was provided that where an adult is charged before a Court of

(1) L. R. 2 Q. B. 379.

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summary jurisdiction with any of the indictable offences specified in the second column of the First Schedule thereto the Court may, with the consent of the person charged, deal with the case summarily, and adjudge him, if found guilty, to be imprisoned for a term not exceeding three months. And by s. 13, where an adult is charged before a Court of summary jurisdiction with an indictable offence which is specified in the first column of the First Schedule and is not comprised in the second column, and the Court is satisfied that there is sufficient evidence to put the person charged on his trial, the Court are to ask him whether he is guilty or not, and if he pleads guilty they are to adjudge him to be imprisoned for any term not exceeding six months. The particular offence with which the present applicant was charged, namely, obtaining money by false pretences, was not originally in the schedule to that Act, but by a later Act of 1899 the schedule is to be read as including that offence. Under those circumstances what are the powers of justices with regard to sentencing a person who pleads guilty at the same time to several indictable offences? It appears that at common law there was a power in the Court before whom a person was convicted of more than one misdemeanour to pass more than one sentence and to direct them to run consecutively. The law is so stated by Blackburn J. in *Reg.* v. *Cutbush* (1), where he refers by way of illustration to the case of *Rex* v. *Wilkes.* (2) In the case of felonies, on the other hand, whether for the reason given by Mr. Rowlatt or not, there was until 1827 no power to pass more than one sentence. But in that year the statute 7 & 8 Geo. 4, c. 28, was passed, by s. 10 of which, "Wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the Court to award imprisonment for the subsequent offence to commence at the expiration of the imprisonment to which such person shall have been previously sentenced." And by the Summary Jurisdiction Act, 1848, s. 25, it was provided that "Where a justice or justices of the peace shall upon any such information or complaint as aforesaid adjudge the defendant to be imprisoned and such defendant shall then be in prison undergoing imprisonment

(1) L. R. 2 Q. B. 379. (2) 4 Burr. at p. 2574.

upon a conviction for any other offence the warrant of commitment for such subsequent offence shall in every such case be forthwith delivered to the gaoler to whom the same shall be directed, and it shall be lawful for the justice or justices issuing the same if he or they shall think fit to award and order therein and thereby that the imprisonment for such subsequent offence shall commence at the expiration of the imprisonment to which such defendant shall have been previously adjudged or sentenced." Apart from authority I should certainly have thought that the Legislature when passing both those sections had in their mind the case of a man who was actually in prison at the time when the second sentence was imposed, and if that were the proper construction to be put upon them, it is obvious that the four last sentences which are the subject of these rules would be ultra vires. But a different construction has been put by the Courts upon both those Acts. It appears from the judgment of Cockburn C.J. in *Reg.* v. *Cutbush* (1) that, according to the practice of judges under the Act of 1827 as far back as living judicial memory went, where a man was at the same time convicted of more than one felony the later sentence or sentences of imprisonment were made to commence at the expiration of the sentence first awarded. And in that case the Court of Queen's Bench put the same construction upon s. 25 of the Act of 1848, the language of the two Acts being substantially the same. In that case the defendant had pleaded guilty to four offences under the Vagrancy Act, 1824, and was sentenced to three months' imprisonment for each offence, the first three sentences to run concurrently, and the fourth to commence at the expiration of the first term of three months' imprisonment. And the Court decided that there was power under s. 25 to impose those sentences, the ground upon which they justified the imposition of two consecutive sentences under that section, as under the Act of 1827, being that a man may be said to be in prison undergoing imprisonment as soon as he is convicted on the first charge and sentenced to imprisonment under it, his liberty being thereby restrained although he is not actually in prison. Although that does not indeed appear to me to be the

(1) L. R. 2 Q. B. 379.

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natural construction of the language, as it has been acted upon now for over forty years, I do not think that we ought to interfere with the practice so far as it allows the imposition of a second sentence to commence from the expiration of the first. But I think that that decision is not one to be extended; and having regard to the reasoning upon which it was founded I think it does not apply to a third sentence commencing at the expiration of the second. It could not fairly be contended that a man was in prison under a second sentence which was not to commence until the expiration of the first from the moment that the gaoler took charge of him in pursuance of the sentence first inflicted. As for Mr. Bodkin's contention that the sentences were bad upon the ground that the justices had no power to inflict more than six months' imprisonment altogether, I do not think it can be supported. It seems quite clear that they have power to inflict a second term of imprisonment, and that each of those terms may be of six months' duration. But for the reasons I have given I think that the last four sentences were bad, and that the rules should be made absolute.

PICKFORD J. I am of the same opinion. One of Mr. Bodkin's arguments was that justices could not pass consecutive sentences under s. 25 of the Summary Jurisdiction Act, 1848, in any cases in which they were dealing with indictable offences under the powers conferred by ss. 10—14 of the Summary Jurisdiction Act, 1879, because the proceedings were not instituted under the Summary Jurisdiction Act, 1848, and the justices were not sitting under that Act, but the proceedings were instituted and the justices were sitting under the Indictable Offences Act, 1848, and therefore the provisions of the Summary Jurisdiction Act, 1848, did not apply. That I think is not sound. For it is met by s. 27, which provides that "The procedure shall until the Court assume the power to deal with such offence summarily be the same in all respects as if the offence were to be dealt with throughout as an indictable offence, but when and so soon as the Court assume the power to deal with such offence summarily the procedure shall be the same from and after that period as if the offence were an offence

punishable on summary conviction and not on indictment, and the provisions of the Acts relating to offences punishable on summary conviction shall apply accordingly." Sect. 25 of the Act of 1848 is such a provision, and the justices were entitled, therefore, to exercise its powers. With regard to the construction of that section the case of *Reg.* v. *Cutbush* (1) decides that justices may at the same time pass two sentences of imprisonment of which the second may be directed to commence at the expiration of the first. The reasoning of that is that, as the section provides that where a defendant shall be in prison undergoing imprisonment a subsequent sentence to commence at the expiration of the first may be passed, the defendant, being in Court and so restrained of his liberty, is considered in prison as soon as ever the first sentence is passed, and then the provisions of the section come into operation. But imprisonment under the second sentence by its terms does not begin until the expiration of the first, and therefore he cannot be said to be in prison under that, and there consequently seems to be no power under the section to impose a sentence to begin at the expiration of the second. I think that there is no power to pass more than two consecutive sentences, and therefore I agree that the rules should be made absolute.

LUSH J. I am of the same opinion. Where there are only two offences, and in respect of the first a sentence of imprisonment is passed to operate at once, I see no difficulty in saying that within the meaning of s. 25 of the Summary Jurisdiction Act, 1848, the man is from that moment in prison undergoing imprisonment. *Reg.* v. *Cutbush* (1) is a clear authority that in such a case the justices have jurisdiction to postpone the operation of the second sentence. But when one seeks to extend that principle to cover a series of offences subsequent to the second, one is met, as it seems to me, with an insuperable difficulty. A sentence which by its terms is not to commence till a future date cannot by any stretch of imagination be said to be a sentence under which immediately on its being passed the man is then undergoing imprisonment. I do not think that *Reg.* v. *Cutbush* (1) is any authority for such a proposition For

(1) L. R. 2 Q. B. 379.

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these reasons I think that the four last sentences should be quashed.

*Rules absolute.*

Solicitor for applicant : *The Official Solicitor.*
Solicitor for justices : *The Solicitor to the Treasury.*

J. F. C.

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*April* 6, 7.

## THE KING *v.* SUNDERLAND CORPORATION.

*Public Office—Obligation of Appointee to serve—Committee of Borough Council —Membership of Committee—Power of Member to resign—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 22.

By s. 22 of the Municipal Corporations Act, 1882, "The council may from time to time appoint out of their own body such and so many committees, either of a general or special nature and consisting of such number of persons as they think fit, for any purposes which in the opinion of the council would be better regulated and managed by means of such committees, but the acts of every such committee shall be submitted to the council for their approval" :—

*Held*, that the rule of the common law, that a person who is qualified cannot refuse to serve a public office to which he is appointed, does not apply to the appointment of a member of a borough council to serve on a particular committee of the council. Membership of such a committee is not an independent public office, and a person who is appointed to serve on it may lawfully resign it against the will of the council who appointed him.

*Quære*, whether the common law rule applies to statutory offices at all.

RULE for a mandamus to the Corporation of Sunderland to elect a person as a member of the Education Committee for their borough.

The council of the county borough of Sunderland consists of forty-eight councillors and sixteen aldermen, the borough being divided into sixteen wards, each of which returns three councillors. By rule 25 of the standing orders made by the council in pursuance of Sched. II., par. 13, of the Municipal Corporations Act, 1882 (1), the work of the council is divided between fifteen

(1) Municipal Corporations Act, 1882, Sched. II., par. 13: "Subject to the foregoing provisions of this schedule the council may from time to time make standing orders for the regulation of their proceedings and business, and vary or revoke the same."

standing committees, namely, Health, Highways, Watch, Finance, Building, Bridge and Ferries, Markets and Baths, Parks, Libraries Museum and Art Gallery, Town Hall, Visiting Committee of the Borough Asylum, Cemeteries, Electricity and Lighting, Education, and Tramways. By rule 27, "The forty-eight councillors shall be distributed amongst the committees in the following proportion, viz.:—One councillor for each ward upon each committee, and each councillor to have a seat upon five committees." By rule 31, "Subject to the requisite appointment thereto by the council where required by law, new councillors shall take the committees of their predecessors, unless the senior councillors of the ward desire to exchange." In the case of the Education Committee the scheme made under s. 17 of the Education Act, 1902 (2 Edw. 7, c. 42), required that the members of the committee should be appointed by the council, one member being appointed for each ward. By clause 7 of the scheme, "The members of the committee shall, subject as hereinafter mentioned continue in office until the 9th day of November next following their appointment or reappointment, on which date they shall retire and be eligible for reappointment by the council at the election of the committee which shall take place annually on that date." Clause 8: "Any member . . . . who by writing signed by him or her and delivered to the town clerk resigns, . . . . shall thereupon cease to be a member of the committee and a casual vacancy thereon shall thereby occur." Clause 9: "If any casual vacancy occurs by death, resignation, disqualification or otherwise the council shall appoint a person to fill the vacancy."

In October, 1910, the councillors for the Bishop Wearmouth ward of the borough were Dr. Bell, Mr. Lawson, and Mr. Laidler, Dr. Bell being a member of the Education Committee. In November Dr. Bell's term of office expired. He sought re-election, but was defeated, Mr. Crawford being elected in his place. It was then arranged between Messrs. Lawson, Laidler, and Crawford that Mr. Lawson, who was opposed to the education policy of the majority of the Education Committee, should have the seat on the Education Committee rendered vacant by the defeat of Dr. Bell. Mr. Lawson accordingly gave notice in accordance

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with the standing orders that he wished to give up the Electricity and Lighting Committee and take the Education Committee subject to the requisite appointment thereto by the council as required by law. The matter came before the borough council on November 9, when Mr. Lawson was duly proposed, but a member of the Education Committee who supported the policy of the majority proposed Mr. Crawford in opposition to him. Mr. Crawford refused to be a candidate, but the mayor ruled that he could not so refuse. The election proceeded and Mr. Crawford was elected. On November 11 Mr. Crawford, acting under the power conferred by clause 8 of the scheme, resigned his position on the Education Committee. The next meeting of the council took place on December 14. Mr. Lawson was nominated to fill the vacancy occasioned by the resignation of Mr. Crawford. Mr. Crawford was again nominated in opposition to Mr. Lawson against his wish and was elected. On the following day he again resigned. On January 11 Mr. Crawford was again elected, and on the same day handed in his resignation; and the same thing took place at the February meeting of the council. The contention of the council was that by the provisions of the standing orders no councillor could be on more than five committees; that Mr. Lawson was already on five committees, namely, the Health, Highways, Watch, Libraries Museum and Art Gallery, and Tramways; that there was no legal provision for the resignation of membership of any of those committees; and Mr. Lawson was consequently not eligible for election to the Education Committee. Under these circumstances the above-mentioned rule for a mandamus was moved on behalf of Mr. Lawson.

*Danckwerts, K.C.*, and *Fleetwood Pritchard*, for the corporation, shewed cause. Mr. Lawson was not eligible as a candidate for the vacant office on the Education Committee unless he could legally resign his membership on the Electricity and Lighting Committee, which he proposed to give up. Membership of such a committee is a public office, and it is a settled rule of the common law that a person who is appointed to a public office is compellable to serve it: *Rex* v. *Bower*. (1) This common law rule

(1) (1823) 1 B. & C. 585.

has been applied to the office of overseer of the poor: *Rex* v. *Jones* (1); *Rex* v. *Great Marlow* (2); *Rex* v. *Poynder* (3); the office of churchwarden, *Cooper* v. *Allnutt* (4); *Birnie* v. *Weller* (5); that of parish constable, *Rex* v. *Adlard* (6); *Rex* v. *Mosley* (7); that of a member of Parliament, *Gloucestershire Election Case* (8); that of sheriff, *Rex* v. *Woodrow* (9); *Attorney-General* v. *Read* (10); *Harrison* v. *Evans* (11); and it equally applies to the office of a committeeman.

[BRAY J. Are not all the cases to which the common law rule has been held to apply cases of common law offices?]

No. It applies to overseers, and the office of overseer is a statutory office owing its origin to the statute of 43 Eliz. c. 2. If then Mr. Lawson was compellable by indictment or otherwise to serve the office of committeeman, it follows that he could not resign it. The standing orders provide only for councillors exchanging their committees, not for their resigning them.

*C. A. Russell*, K.C., and *Simey*, in support of the rule. The position of a committeeman is not an office at all. His office is that of a councillor. For purposes of convenience the council may by s. 22 of the Municipal Corporations Act, 1882, appoint committees out of their own body to transact their business. But a councillor when appointed to such a committee does not get a fresh office. No comparison is to be drawn between a committeeman and churchwardens, constables, overseers, and the other public officers that have been referred to. The contention that by virtue of the common law a committeeman when once appointed has no right to resign cannot be supported. It is entirely opposed to what in common knowledge is the general practice. For instance there is no express provision in the Metropolis Management Act, 1855, for the resignation of members of a district board, but a variety of sections assume that such persons may lawfully resign. Sects. 37, 45, and 47 say what is to be done if a member of the board "dies, resigns, or otherwise

(1) (1741) 2 Str. 1146.
(2) (1802) 2 East, 244, per Lawrence J.
(3) (1823) 1 B. & C. 178.
(4) (1820) 3 Phillim. 165.
(5) (1831) 3 Hagg. 474.
(6) (1825) 4 B. & C. 772.
(7) (1835) 3 Ad. & E. 488.
(8) (1623) Glanville, El. Cas. 99.
(9) (1788) 2 T. R. 731.
(10) (1678) 2 Mod. 299.
(11) (1767) 3 Bro. P. C. 465.

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ceases to be such member." So too the education scheme in the present case treats resignation as something which may lawfully be done. Clause 8 does not confer a power of resignation, it assumes its existence. There is no means of compelling a councillor to serve on a particular committee. Even if all the councillors were to refuse to serve on a particular committee there would be no remedy against the individual members.

[He was stopped by the Court.]

LORD ALVERSTONE C.J. This case raises a question of very considerable importance, namely, whether a councillor of a borough has or has not a right to resign his membership of a committee of the council to which he has been appointed. The power of appointing such committees is derived from s. 22 of the Municipal Corporations Act, 1882, which provides that "The council may from time to time appoint out of their own body such and so many committees . . . . as they think fit for any purposes which in the opinion of the council would be better regulated and managed by means of such committees." And by Sched. II., par. 13, of that Act, "The council may from time to time make standing orders for the regulation of their proceedings and business and vary or revoke the same." It is said that when once a councillor has been appointed to a committee he must continue to discharge his duties on that committee and cannot resign. Our attention has been called to a series of cases in which a person who has been appointed to a public office, such as an overseer, sheriff, parish constable, churchwarden, and member of Parliament, is compelled to serve that office and may be proceeded against by indictment or by the levying of a fine in the event of his refusal or neglect to discharge its duties. But those cases are all clearly distinguishable from that of a committeeman. They are all independent offices, which the position of a committeeman is not. The appointment of the committees is merely machinery for the discharge by the council of its business, and the acts of the committee are all subject to the council's approval. The standing orders which have been made under Sched. II., par. 13, for the regulation of.

the council's business do not deal with the subject of resignation from a committee; they rather contemplate that, subject to the exchange of committees with another councillor, a councillor who has once been appointed on a committee will in practice continue a member of that committee until his three years term of office as councillor expires. That being so, we have to consider to what extent the question is affected by the scheme made under the Education Act, 1902. That scheme provides that one councillor shall be appointed on the Education Committee from each ward, and by clause 7 that the committee shall be elected afresh every year in November. Clause 8 provides that any member who resigns shall cease to be a member of the committee and a casual vacancy thereon shall thereby occur. By clause 9, "If any casual vacancy occurs by . . . . resignation . . . . the council shall appoint a person to fill the vacancy." Those clauses taken together seem to shew that the intention of the scheme was that any one of the three councillors of the ward might be elected on the Education Committee. It cannot have been intended that the council must re-elect the same person simply because the other two councillors have already got five committees apiece. So to hold would stultify the whole effect of the clauses of the scheme to which I have referred. I think, therefore, that when Mr. Crawford resigned it was the duty of the council to hold an election between candidates other than Mr. Crawford, and that Mr. Lawson had for the purpose of being a candidate a right to resign from the Electricity and Lighting Committee. The result is that this rule must be made absolute.

BRAY J. I am of the same opinion. The point raised by Mr. Danckwerts is one of great importance. He says that in the absence of some special provision empowering him to do so a committeeman once appointed has no right to resign. Now that is so contrary to what one knows to be the practice of committees of local authorities that I should be slow to come to such a conclusion in the absence of authority. It is admitted that there is no authority on the point, but it is said that the position of a committeeman is an office, and that by the common law in

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the absence of express power a person appointed to an office cannot resign. A number of cases have been cited in support of that proposition, but it is admitted that all those cases, with the exception of those relating to overseers, are cases of common law offices. The office of overseer is undoubtedly a statutory office, having been created by the Act of 43 Eliz. c. 2. But when we look at that statute it appears that the statute itself negatives the right of the appointee to resign. Sect. 2 says that the overseers when appointed shall discharge the duties therein "upon pain that every one of them absenting themselves without lawful cause as aforesaid . . . . or being negligent in their office . . . . to (*sic*) forfeit for every such default of absence or negligence twenty shillings." The inability of the overseer to resign his office is due, not to any rule of the common law, but to the statute. There seems therefore to be no authority that the common law rule applies to any but common law offices, or that the appointee of a statutory office cannot, in the absence of statutory prohibition, resign it. And there does not seem to be any statutory prohibition against a committeeman resigning. My Lord has pointed out that there is nothing in the standing orders which purports to prevent him from doing so; but I am inclined to go further and say that even if there were, the education scheme, which has the force of a statute, would prevent the standing order from being a valid one. The scheme contemplates a freedom of election between the three representatives of the ward, which would be an impossibility if on a vacancy arising on the Education Committee the two remaining councillors were ineligible by reason of their being already on five committees each. So that any prohibition on those two councillors resigning one of their other committees would defeat the object of the scheme. I am of opinion, therefore, that even if the position of committeeman on the Electricity and Lighting Committee was a public office, Mr. Lawson had a right to resign it. But I am of opinion that it was not a public office at all. Sect. 22 of the Municipal Corporations Act, 1882, which empowers the council to appoint committees, expressly says that "the acts of every such committee shall be submitted to the council for their approval." That is altogether inconsistent with membership of a committee

being an independent office. Mr. Lawson's office was that of a councillor; he had no other.

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BANKES J. I agree.

*Rule absolute.*

Solicitor for prosecutor: *Isadore Goldman.*

Solicitors for the corporation: *Sharpe, Pritchard & Co., for F. M. Bowey, Town Clerk, Sunderland.*

J. F. C.

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## THE KING *v.* GODSTONE RURAL DISTRICT COUNCIL.

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*April* 5; *May* 1.

*Practice—Inspection of Documents—Privileged Documents—Right of Parochial Elector to inspect—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 58, *sub-s.* 5.

By s. 58, sub-s. 5, of the Local Government Act, 1894, "Every parochial elector of a parish in a rural district may at all reasonable times without payment, inspect and take copies of and extracts from all books, accounts, and documents belonging to or under the control of the district council of the district."

A parochial elector of a parish in a rural district having threatened litigation against the council of the district, the council took the opinion of counsel as to their liability. The parochial elector claimed a right under the above section to inspect the case submitted to counsel and his opinion thereon:—

*Held*, that the case and opinion were "documents" within the meaning of the section, but that under the circumstances the Court would not enforce the parochial elector's right of inspection by mandamus.

RULE for a mandamus to the Godstone Rural District Council to allow the prosecutor, Mr. A. H. Hastie, to inspect certain opinions of counsel and other documents.

Mr. Hastie was a resident in the parish of Lingfield, in the Godstone rural district. A certain lane in the said parish, known as Water Lane, being so much out of repair as to be impassable for traffic, Mr. Hastie, who claimed that the lane was a public highway and was repairable by the inhabitants at large, pressed the district council to repair it. The council, who denied that the lane was repairable by the inhabitants or that it was a

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highway at all, refused to do so, whereupon Mr. Hastie threatened to take legal proceedings to compel them to put it in repair. In view of the litigation so threatened the council submitted certain cases for opinion to counsel together with plans and other papers for the purpose of advising them as to their liability, if any, with respect to the lane. The fact of counsel's opinion having been so taken having come to the knowledge of Mr. Hastie, he demanded inspection of the cases so submitted to counsel and of counsel's opinions thereon, claiming that he as a parochial elector had a right to inspect them under s. 58, sub-s. 5, of the Local Government Act, 1894. The council refused to give inspection, and Mr. Hastie obtained a rule nisi for a mandamus to the district council to allow him to inspect the said cases and opinions and also all minutes of the meetings of the council relating to the liability for the repair of the lane.

*Macmorran, K.C.*, and *W. Mackenzie*, for the district council, shewed cause. Having regard to the fact that litigation is threatened between the prosecutor and the council, the prosecutor is not entitled to see these documents. They are privileged although the litigation has not actually begun. Documents which come into existence in view of litigation reasonably apprehended are privileged from inspection by the other side: *Collins* v. *London General Omnibus Co.* (1); and it makes no difference that the prosecutor is a parochial elector. Sect 58, sub-s. 5, of the Local Government Act, 1894, must be read subject to the general rule as to privileged documents: *Rex* v. *Bradford-on-Avon Rural District Council.* (2) That case is a direct authority in the respondents' favour. Secondly, the word "documents" in sub-s. 5 refers only to documents connected with the accounts of the parish or district. Sect. 58 is a section dealing only with the making up and audit of accounts; and "documents" means documents which the auditor would be entitled to call for.

*Danckwerts, K.C.*, and *Miles Hansell*, in support of the rule. No privilege attaches to these documents as against the prosecutor. The district council are in the nature of trustees for the

(1) (1893) 68 L. T. 831. (2) (1908) 99 L. T. 89.

ratepayers. And privilege has no existence where the relation of the parties is that of trustee and cestui que trust. It has accordingly been held that a trustee cannot refuse inspection to cestuis que trust of cases and opinions of counsel taken by him in contemplation of litigation with the applicants: *Devaynes* v. *Robinson*. (1) The prosecutor has a statutory right under s. 58, sub-s. 5, of the Act of 1894 to see "all documents" belonging to the district council without distinction. And the case cited of *Rex* v. *Bradford-on-Avon Rural District Council* (2) is an authority that documents include cases and opinions of counsel. If then he has a statutory right to see them, the Court has no jurisdiction to inquire into the motive with which he asks to see them: *Davies* v. *Gas Light and Coke Co.* (3)

*Cur. adv. vult.*

May 1. LORD ALVERSTONE C.J. read the following judgment:—In this case a rule nisi had been obtained on behalf of Mr. Hastie calling on the Godstone Rural District Council to shew cause why a writ of mandamus should not issue to compel them to permit Mr. Hastie to inspect and take copies of and extracts from all cases for the opinion of counsel, and all opinions of counsel with documents and plans accompanying, and all minutes of the meetings of the council and committees of the council held between February 2, 1910, and December 31, 1910, belonging to or under the control of the council with reference to the repair of, and the liability to repair, the road known as Water Lane in the parish of Lingfield aforesaid, and described and referred to in the affidavit of the said A. H. Hastie, and the exhibit to such affidavit, or concerning the said road, pursuant to the Local Government Act, 1894, s. 58, sub-s. 5, on the ground that inspection was refused contrary to the said statute. This application was based upon the provisions of sub-s. 5 of s. 58 of the Local Government Act, 1894. The council consented to the inspection of the minutes, but refused to give inspection of the cases for opinion of counsel and the documents other than the minutes.

(1) (1855) 20 Beav. 42. (2) 99 L. T. 89.
(3) [1909] 1 Ch. 248.

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Lord Alverstone C.J.

Two main points were raised on behalf of the district council in shewing cause against the rule. It was first contended that the words "books, accounts, and documents" in the sub-section did not include such documents as those referred to in the rule, but were confined to books, accounts, and documents which would be brought before the auditor for the purpose of audit under the earlier sections of the Act. The question as to the meaning of the word "documents" is not free from difficulty, but upon the whole, having regard to the provisions of the earlier sections of the Act, and particularly ss. 5, 6, and 17, I am not disposed to put so narrow a construction on the word "documents" as that contended for by counsel for the rural district council, and without deciding whether the words are in any way limited, if this was the only ground raised I should not have been disposed to discharge the rule.

The second ground, however, taken is one which requires careful consideration. The district council say that their cases for opinion, and all documents referred to in the rule, were only called into existence in consequence of a claim, and threat of legal proceedings founded upon such a claim, to compel the council to repair a road alleged by Mr. Hastie to be a public highway, and it was urged by Mr. Danckwerts that the prima facie ground for Mr. Hastie's claim was so strong that he had a special interest in inspecting the documents in question. It cannot, I think, be denied that the sections in question do not contemplate such a right as that which is claimed by Mr. Hastie. Sub-s. 5 gives a right to the parochial elector, and many cases might be put, in which great injustice would be done if any person engaged in dispute or litigation with a public authority was entitled to inspect all documents simply because he was a ratepayer, as for instance reports or cases for opinion in respect of the dismissal of a servant. Be this as it may, I am satisfied that the section intended to give the right of inspection to ratepayers as such, and not to persons who desired to inspect documents from some other motive, and the conclusion which I draw from the affidavits, and from Mr. Hastie's statements in his public correspondence and made on his behalf, is that he did not desire to inspect the documents as a ratepayer, but as a litigant

and with the view of obtaining, if he could, evidence in support of his claim that the rural district council should repair the road. The case is very similar to that of *Rex* v. *Bradford-on-Avon Rural District Council* (1), and having regard to the principles then adopted by the Court I am clearly of opinion that this rule should be discharged.

BRAY J. I have had the opportunity of reading the judgments of my Lord and my brother. I agree entirely with the view they take as to the construction of the sub-section of the Act of 1894 in question.

I think the limitation suggested cannot be placed on the words all books, accounts, and documents, and consequently they include the case submitted to counsel and counsel's opinion thereon. That being so, Mr. Hastie had a statutory right to inspect these documents, and prima facie he would be entitled to a writ of mandamus to enforce his statutory right. It is clear, however, that the Court has a discretion to refuse the writ, and my Lord and my brother think that in the special circumstances of this case we ought to exercise that discretion by refusing the writ. I doubt if the position or conduct of Mr. Hastie, or the nature of the documents, affords sufficient justification to this Court for refusing him his statutory right, but as my Lord and my brother feel so strongly that they do, I do not desire to dissent.

BANKES J. [His judgment was read by Bray J.] This is a case in which a dispute has arisen between Mr. Hastie, a parochial elector residing within the district of the Godstone Rural District Council, and that council with reference to the repair of a road situate within the district of the council. It is common ground between the parties that the road has not been repaired for very many years, and its present condition is described in the affidavit of the chairman of the council, who states that the lane is quite impassable to either vehicular traffic or to pedestrians, and that it has been so for many years; that there are trees growing in the middle of the lane of a girth of 10 inches, that in places the lane is only 12 feet wide, and for a considerable

(1) 99 L. T. 89.

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distance it is in the bed of the river, the water being over 2 feet deep, and that it is flooded in winter when the water rises to a considerable height. In one of his early letters to the district council Mr. Hastie estimates that the cost of doing all the repairs which he contends that the council are liable to do would amount to 5000*l.*, equivalent to an extra rate for the year on Lingfield parish of about 4*s.* in the pound. The dispute between Mr. Hastie and the district council has been going on for more than a year. A considerable correspondence has taken place between them, in which Mr. Hastie has made it quite plain that he intends to take proceedings to compel the council to repair the road unless they accept the responsibility of doing so, and the council have throughout maintained that they were under no liability to repair the road. Mr. Hastie states in his affidavit that it would be a great convenience to him if the road was put into a proper condition of repair. That, no doubt, is so, but the district council are the representatives of the general body of ratepayers, and it may very well be that in this particular matter the interests of Mr. Hastie and the interests of the general body of the ratepayers of the district are diametrically opposed to each other. I see no evidence that the district council were not prepared to give, or did not give, Mr. Hastie's claim the fullest consideration, and by the month of October, 1910, they had submitted a case to counsel for his opinion. On October 29 their clerk wrote to Mr. Hastie informing him that the council had been unable to come to a definite conclusion, as they had not received the final opinion of counsel, and to this Mr. Hastie replied on October 31 that in view of the fact that the time specified in his original offer had long since expired he would be no longer satisfied with anything less than the best road he was entitled to, and that he would allow the council until December 1 to make up their minds, but if they did not do so before that date proceedings would be taken and the time would not be extended under any circumstances. On November 26 the clerk to the council wrote to Mr. Hastie, sending him a copy of a resolution of the council declining to accept Water Lane as a repairable parish road, but offering to submit the matter to arbitration to the county council. This offer was not accepted

by Mr. Hastie, and in his letter of November 29 declining the offer he put forward the claim he now makes, namely, to exercise his statutory right to inspect all the cases and accompanying plans and documents and the opinions of counsel which had been taken by the district council in regard to this matter. In his affidavit Mr. Head, the clerk to the district council, sets out the circumstances under which these documents came into existence, and he establishes a state of things which, as between ordinary litigants, would protect these documents from inspection on the ground of privilege.

Two questions were argued before us: first, whether Mr. Hastie has the statutory right which he claims, and secondly, if he has, whether the Court ought to enforce it by mandamus. The first question depends upon the construction which ought to be put on sub-s. 5 of s. 58 of the Local Government Act, 1894. The section is one dealing with the audit of accounts, and it was contended on behalf of the district council that the documents referred to in sub-s. 5 ought to be limited to the kind of documents which are subject to audit, or which come into existence for the purpose of an audit. I cannot so read the sub-section. There are a number of provisions in the Act relating to documents which are to vest in the parish council and which deal with the custody of such documents: see ss. 5, 6, and 17. These documents are from their nature public documents properly so called, and I think that it is impossible to contend that the right of inspection given to the parochial elector by the sub-section in question does not extend to such documents as these. If so, I do not see that any restriction can be placed upon the general language of the sub-section which will exclude the documents referred to in the rule nisi obtained by Mr. Hastie.

These documents are of two classes: (*a*) the minutes of the district council and of committees of the council relating to the said road; (*b*) the cases for the opinion of counsel and all opinions of counsel with documents and plans accompanying. With regard to the first class, it appears that no objection has ever been made to Mr. Hastie inspecting these, and that an appointment was made for him to inspect them before the rule was moved. The rule ought, therefore, to be discharged as to these documents.

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With regard to the other documents, the statutory right of inspection can only be made effective by this Court directing the council to allow inspection. I know of no authority which specially limits the discretion of the Court in enforcing this statutory right, and in my opinion the Court ought in this particular case to exercise its discretion and refuse to make the rule absolute.

The affidavits and the correspondence make it to my mind abundantly clear that Mr. Hastie had finally decided, before this rule was moved, to take proceedings to enforce what he considered to be his right. I see no evidence at all that the council in the decision they have come to are acting perversely, or contrary to the general wishes of the ratepayers whom they represent, or in defiance of their counsel's opinion. Under these circumstances the effect of making the rule absolute (whether it is the object of the application or not) would be to put Mr. Hastie in possession of all the materials which the council have collected for submission to counsel, which together with the case submitted to him would probably form a substantial part of the council's brief at the trial in the event of Mr. Hastie proceeding to trial. To apply for inspection of these documents under these circumstances is not, in my opinion, making a legitimate use of the provisions of the Act of Parliament, and I think that the rule ought to be discharged.

*Rule discharged.*

Solicitors for district council: *Turner & Evans, for E. Alston Head, East Grinstead.*

Solicitors for prosecutor: *Hasties.*

J. F. C.

TKB.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1910 *Dec.* 12, 16. C. A. 1911 *May* 1.

## WILKES *v.* SPOONER AND ANOTHER.

*Restrictive Covenant—Purchaser for Value without Notice—Subsequent Purchaser with Notice—Constructive Notice.*

The purchaser of land from one who has purchased it for value, without notice, either actual or constructive, of a restrictive covenant, is not bound by the covenant, although he himself had notice of it.

The lessee of premises No. 137, High Street, East Ham, carried on therein the business of a pork butcher. The lease contained a covenant by which he covenanted not to carry on therein any noisy or offensive trade other than that of a pork butcher. He was also lessee under a different landlord of premises No. 170, in the same street, upon which he carried on the business of a general butcher. He sold and assigned to the plaintiff his interest in the last-mentioned premises, and the goodwill of his business as a general butcher, covenanting with the plaintiff (inter alia) that he, his executors, administrators, and assigns, would not "cut, sell or deal in fresh hindquarter beef, mutton, veal, lamb, or poultry at or upon the premises No. 137, High Street, East Ham, or in connection with the business of a pork butcher now carried on there by him." He afterwards gave up business, and surrendered his lease of No. 137 to the landlord; and a new lease thereof was granted to his son by the landlord, which lease contained a covenant that the lessee would not carry on upon the premises any noisy or offensive trade other than "—not "that of a pork butcher," as in the old lease, but—"that of a butcher."

At the time when the landlord accepted the surrender, he had not in fact notice of the restrictive covenant entered into by the father with the plaintiff as regards No. 137, but the son, when the new lease was granted to him, knew of the existence of that covenant. The son afterwards set up the business of a general butcher on the premises No. 137, High Street:—

*Held*, that under the circumstances of the case the landlord was not affected with constructive notice of the father's covenant, and, consequently, could grant to the son a lease free from the restriction of that covenant, and that the son therefore could not be restrained at the suit of the plaintiff from carrying on the business of a general butcher at No. 137.

*Lowther* v. *Carlton*, (1741) 2 Atk. 242; Barn. 358, and *Barrow's Case*, (1880) 14 Ch. D. 432, followed.

TRIAL of action by Scrutton J. without a jury.

The action was brought by the plaintiff, who was a butcher carrying on business at No. 170, High Street, East Ham, in the

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county of Essex, against two defendants, namely, Isaac James Spooner and his son, George Leonard Spooner.

The plaintiff claimed (1.) against the defendant Isaac James Spooner damages for breach of covenants contained in an indenture of assignment dated August 31, 1908, and (2.) against both the defendants an injunction to restrain them, their servants and agents, from cutting, selling, or dealing in fresh hindquarter beef, mutton, veal, lamb, or poultry at or upon certain premises known as No. 137, High Street, East Ham, aforesaid, or in connection with the business of a pork butcher carried on there.

Before August, 1908, the defendant Isaac James Spooner, the father, was in occupation of No. 137, High Street under a lease for a term of twenty-one years from September 29, 1903, in which he had covenanted not to carry on therein any noisy or offensive trade other than that of a pork butcher. He was also in occupation under a different landlord of No. 170, High Street, in which he carried on the business of a general butcher.

By an indenture of assignment dated August 31, 1908, and made between Isaac James Spooner and the plaintiff, Isaac James Spooner sold and assigned to the plaintiff the leasehold interest of the premises No. 170, High Street, and all his interest and goodwill in the trade or business of a butcher for the consideration therein mentioned, and Isaac James Spooner, therein called the vendor, covenanted with the plaintiff, therein called the purchaser, in the following terms:—"That the vendor will from time to time and at all times hereafter use his best endeavours to promote the said trade or business, and to secure to the purchaser, his executors, administrators, and assigns, the full advantage of the connection and custom of the vendor in the said trade or business, but so that the vendor shall not be required to incur any expense in or about the performance of this covenant: And also that the vendor, his executors, administrators, or assigns, will not at any time hereafter, either alone or jointly or in partnership with or as agent for any other person or persons, and either directly or indirectly, carry on or be concerned or interested in, or assist any other person or persons to carry on or to be concerned or obtain any interest in,

the trade or business of a butcher within three miles of 170, High Street, East Ham, aforesaid: And further that he, the vendor, his executors, administrators, and assigns, will not cut, sell or deal in fresh hindquarter beef, mutton, veal, lamb, or poultry at or upon the premises No. 137, High Street, East Ham, aforesaid, or in connection with the business of a pork butcher now carried on there by him."

In 1909 Isaac James Spooner decided to give up the business of a pork butcher which he had carried on at No. 137, High Street. The defendant George Leonard Spooner was minded to carry on that business. He knew of the restrictive covenant under which Isaac James Spooner had placed No. 137, High Street and the business carried on therein, and took legal advice from solicitors as to the effect of it. Subsequently, Isaac James Spooner went to the landlord's agent, and offered to surrender his lease. The landlord required a new lessee. Isaac James Spooner proposed George Leonard Spooner as the new lessee. A draft of a new lease was prepared and submitted to George Leonard Spooner. This draft was for a new lease for a longer term than the surrendered lease, but in other respects the two documents were in the same terms. From the clause in the draft lease restraining the lessee from carrying on any noisy or offensive trade "other than that of a pork butcher" George Leonard Spooner struck out the word "pork," thus leaving himself free, so far as the lessor was concerned, to carry on the trade of a general butcher. The lessor accepted the alteration. Isaac James Spooner then closed the shop; George Leonard Spooner shortly afterwards reopened it and began to carry on the business of a general butcher.

The plaintiff then brought this action claiming the relief above stated.

*A. Powell, K.C.*, and *Hugo Marshall*, for the plaintiff.

*F. St. John Morrow*, for the defendant Isaac James Spooner.

*Stephen Lynch*, for the defendant George Leonard Spooner.

*Cur. adv. vult.*

1910. Dec. 16. SCRUTTON J. read the following judgment:— This action was set down before me for trial with a common

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jury. As it soon appeared that very few facts were in dispute, but that the questions involved required a nice appreciation of the equitable doctrine of negative easements and restrictive covenants, it was agreed to discharge the jury and try before me alone.

The facts I find to be as follows:—Before August, 1908, the defendant Isaac James Spooner, the father, was in occupation of 137, High Street, East Ham, under a lease for a term of twenty-one years from September 29, 1903, with a covenant that he would not carry on therein any noisy or offensive trade other than that of a pork butcher. He was also in occupation of 170, High Street, in which he carried on the trade of a general butcher. The plaintiff, Edwin Stuart Wilkes, who had been apprenticed with Spooner, the father, bought on August 31, 1908, for the sum of 450*l.* the leasehold interest in 170, High Street, and the interest and goodwill of a butcher's business therein carried on, from Isaac James Spooner, the vendor, covenanting as follows. [The learned judge read the covenants set out above, and continued.] The last appears to be a restrictive covenant applicable to any interest the vendor might have in 137, High Street, and would, for instance, certainly apply if the vendor afterwards bought the freehold of No. 137.

In 1909 Isaac James Spooner, the father, became in pecuniary difficulties and thought of giving up the business at 137, High Street. The other defendant, G. L. Spooner, his son, had at that time a butcher's business in Kensington; but, hearing through his brother-in-law that his father proposed to give up his pork butcher's business at No. 137, the son was minded to carry it on. He had known during the early part of the year 1909 of the restrictive covenant under which his father had placed his business at No. 137; and on November 16, 1909, the father and son went together to their solicitors, and took the solicitors' advice on the effect of the covenant in the assignment to Wilkes. After the interview the father went to the agent of the landlord of 137, and offered to surrender his lease. The landlord required a new lessee to be found. The father said his son would take a new lease, and submitted his son's references. On a new draft lease being submitted to the son,

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for a longer term, but otherwise in the same terms as the surrendered lease, the son struck out of the draft the word "pork", in the restrictive covenant, leaving himself free, as far as the landlord was concerned, to carry on the trade of a general butcher; and the landlord accepted the alteration. The father then closed the shop, which, after remaining closed for three or four days, was opened by the son as a general butcher's shop. The plaintiff Wilkes, who had paid in August, 1908, 450*l.* for the father's general butcher's business at No. 170, on the faith of a restrictive covenant against the sale of fresh meat other than pork at No. 137, thus saw in December, 1909, a general butcher's business selling such fresh meat opened at No. 137 in competition with him by the son of his vendor. He was not unnaturally annoyed, and brought this action.

Against the father Isaac James Spooner he claimed for a breach of the covenants in the assignment. I find that until November 16, 1909, the father had not committed a breach of any of these covenants, but that, on and shortly after that date, he did surrender his lease to enable the son to establish a general butcher's business at No. 137, and did his best to procure for his son a new lease of No. 137 free from any restrictive covenant limiting it to a pork butcher's business. I find that this was a breach of his covenant to use his best endeavours to promote the trade or business at No. 170, and to secure to Wilkes the full advantage of his, the vendor's, connection at 170. I also find that it was a breach of the covenant not to assist any other person to carry on or to be concerned or obtain any interest in the trade of a butcher within three miles from 170, High Street. I find that the father is not pecuniarily interested in the business now carried on by the son at No. 137, High Street; and the son is not, in my view, the father's "assign." I therefore find that the father is not breaking the third covenant in the assignment. I assess the damages for the breaches of the first and second covenants at 60*l.*, the damage being the same from either breach. I assess these damages up to to-day, as I am about to grant an injunction against the son in respect of the business at No. 137. Should that injunction be dissolved by the Court of Appeal, the damages for which the father is liable would be greater, and I assess them in that event at 200*l.*

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The case against the son is based on different grounds. Since *Tulk* v. *Moxhay* (1), where a person having an interest in land has covenanted not to use that land in a particular way, equity has restrained those who take a subsequent interest in the land (if their title is only equitable) from interfering with the prior equitable interest by infringing the restrictive covenant, and this whether they have notice of the covenant or not. The only way in which they can escape from the burden of the covenant and of the equitable interest created by the covenant is by proving that they have acquired the legal estate for value without notice of the covenant, in which case their legal estate overrides the equitable interest. But, if they had notice of the covenant when they acquired the legal estate, equity will enforce the obligation on their conscience even against the legal estate. There was originally some doubt as to the ground on which this equitable jurisdiction proceeded. Sir George Jessel in *London and South Western Ry. Co.* v. *Gomm* (2) considered it to be "either an extension in equity of the doctrine of *Spencer's Case* (3) to another line of cases, or else an extension in equity of the doctrine of negative easements." Later decisions of the Court of Appeal have taken the latter view: see *Rogers* v. *Hosegood* (4) and *In re Nisbet and Potts' Contract.* (5) These cases establish that the burden of the restrictive covenant is an equitable interest in the land which "inhered in or was annexed to the land": per Collins M.R. (6) In the latter case the restrictive covenant was enforced against a purchaser from a person who had acquired a squatting title to the land under the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), and who did not prove that he bought without notice, because if he had required a forty years' title he would have discovered the restrictive covenant. Such a covenant has also been enforced against mere occupiers. Further, the doctrine applies both when the covenantor is a freeholder and when he has only a leasehold interest in the land. It also applies to personal

(1) (1848) 2 Ph. 774.
(2) (1882) 20 Ch. D. 562, at p. 583.
(3) (1582) 5 Rep. 16a.
(4) [1900] 2 Ch. 388.
(5) [1905] 1 Ch. 391; [1906] 1 Ch. 386.
(6) [1900] 2 Ch. 388, at p. 407.

property generally: see *De Mattos* v. *Gibson*. (1) It has been applied to leasehold interests in the cases of *John Brothers Abergavw Brewery Co.* v. *Holmes* (2) and *Luker* v. *Dennis*. (3) The latter case is of great authority on the facts before me. A brewer granted a publican a lease of public-house A., on the terms that the tenant should take from the brewer not only the liquor consumed at public-house A., but also at public-house B., which the tenant held on lease from a different landlord. And on the tenant assigning his lease of public-house B. to another person who had notice of his covenant, the assignee was held bound by the covenant. This must be on the above decisions, because the lessee of public-house B. had created an equitable interest in his lease, which passed to and bound his assignee with notice. But the importance of the case does not stop here, for it was pointed out in argument (4) that the tenant's original lease of B. was for twenty-one years from a date, whereas he had assigned a term of twenty-eight years from a different date; and it was answered and determined by the Court that if, as seemed likely, he had surrendered his term, and had taken a new lease, he and any assignee from him were estopped from setting up the surrender against the person claiming on the restrictive covenant. This was supported by the judgment of Lord Campbell in *Piggott* v. *Stratton*. (5) It was pointed out there that a surrender only affects what the surrenderor can surrender, and when he has granted subordinate terms or sub-leases, they are not discharged. Lord Ellenborough says in *Doe* d. *Beadon* v. *Pyke* (6), "We consider it as clear law, that though a surrender operates between the parties as an extinguishment of the interest which is surrendered, it does not so operate as to third persons, who at the time of the surrender had rights, which such extinguishment would destroy, and that as to them, the surrender operates only as a grant, subject to their right, and the interest surrendered still has, for the preservation of their right, continuance." It follows then from

(1) (1859) 4 De G. & J. 276, 282.
(2) [1900] 1 Ch. 188.
(3) (1877) 7 Ch. D. 227.
(4) 7 Ch. D. at p. 233.
(5) (1859) 1 De G. F. & J. 33, at pp. 45, 46.
(6) (1816) 5 M. & S. 146, at p. 154.

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the principles already laid down that, if the plaintiff in the present case had acquired an equitable negative easement in the leasehold interest of the defendant Isaac James Spooner, the father, in No. 137, the father could not defeat that interest by surrendering to the landlord. The interest remained against the father for the term of the original lease, and it would appear to remain against the landlord, unless he obtained the legal estate for value without notice. A surrender to the landlord would not affect sub-leases granted by the tenant—*Mellor* v. *Watkins* (1)—because, though the landlord got a legal estate by the surrender, this could not affect a legal interest which the lessee or surrenderor had parted with and therefore could not surrender. And if the lessee had created not a legal but an equitable interest, such as that created by the restrictive covenant in the present case, the surrenderee, the landlord, has constructive notice of the title of his surrenderor, the lessee, which he would have discovered had he made inquiries, and therefore cannot use his legal title against the equitable interest: cf. *Patman* v. *Harland*. (2) The interest also remained against any one taking a grant of the premises from the landlord, with notice of the original covenant. The defendant, the son, is exactly in the latter position, for I find that the son knew before the surrender of the father's restrictive covenant, and that the father made the surrender at the son's request in the idea that the restrictive covenant would not be binding on the son if he got a new lease from the landlord. I may add, to prevent misunderstanding, that it was not contended before me that Nos. 137 and 170 were part of a common building scheme so as to bring them within the doctrine of *Renals* v. *Cowlishaw* (3), *Spicer* v. *Martin* (4), and *Elliston* v. *Reacher*. (5) My judgment would be the same if there had been no restrictive covenant in the original lease of No. 137.

Mr. Powell, for the plaintiff, did not ask for damages against the son, though on principle I think the plaintiff was entitled to them. I therefore give judgment against Isaac James Spooner,

(1) (1874) L. R. 9 Q. B. 400.
(2) (1881) 17 Ch. D. 353.
(3) (1879) 11 Ch. D. 866.
(4) (1888) 14 App. Cas. 12.
(5) [1908] 2 Ch. 374.

the father, for 60*l.* damages and costs; against George Leonard Spooner for an injunction in terms of the second claim of the writ, with costs.

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*Judgment for the plaintiff accordingly.*

W. H. G.

The defendant G. L. Spooner appealed.

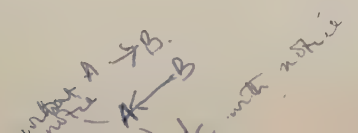
1911. May 1. *G. Care, K.C.* (*Lynch* with him), for the defendant G. L. Spooner. In order that the plaintiff might succeed as against the defendant G. L. Spooner, he had to prove that the landlord had, when he accepted the surrender of No. 137, High Street, and granted the new lease, notice, either actual or constructive, of the restrictive covenant entered into by the elder defendant. If the legal estate in property comes into the hands of a purchaser for value without notice of a restrictive covenant in relation thereto, he can convey it free of the covenant to a subsequent purchaser, though the latter may have notice of the covenant. If in a succession of purchases the chain of notice is broken, the subsequent purchaser is not affected by the restrictive covenant: *Lowther* v. *Carlton* (1); *Sweet* v. *Southcote.* (2)

[VAUGHAN WILLIAMS L.J. referred to Ashburner's Principles of Equity, p. 75.]

There was clearly no actual notice of the restrictive covenant to the landlord, when he accepted the surrender of No. 137, and there were no circumstances under which he could be affected by constructive notice. No. 170 was held under a different landlord, and the title to those premises had nothing to do with the title to No. 137. There was nothing to put the landlord upon inquiry as to the existence of such a covenant. The case of *In re Ford and Hill* (3) clearly shews that he was not called upon to make such an inquiry. *Luker* v. *Dennis* (4) is quite a different case from the present. There the defendant had actual notice of the covenant, and Crabb, his assignor, was himself the covenantor.

[FARWELL L.J. That case was as if the father in the present

(1) 2 Atk 242; Barn. 358.
(2) (1786) 2 Bro. C. C. 66.
(3) (1879) 10 Ch. D. 365.
(4) 7 Ch. D 227



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case had surrendered, and then taken a new lease, and assigned it to the son.]

The provisions of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3, shew that the landlord here had not constructive notice of the covenant.

*A. Powell, K.C.*, and *Hugo Marshall*, for the plaintiff. The point as to constructive notice to the landlord was not really argued in the Court below. The doctrine of *Tulk* v. *Moxhay* (1), as developed by subsequent cases, imposes, in the case of a restrictive covenant, a burden on the land in equity, which can only be got rid of by shewing that the defendant was a purchaser of the legal estate for value without notice. The defendant G. L. Spooner had notice of the restrictive covenant when he took the new lease of No. 137. It is submitted that it was, therefore, binding upon him, and that there is no necessity for a continuous chain of notice as suggested. But, if there was, the landlord in this case had, as the learned judge has found, constructive notice of the restrictive covenant when he accepted the surrender of the lease of No. 137. He ought to have inquired, before he accepted the surrender, and granted the new lease in altered terms, whether the surrenderor had entered into any covenants, or done anything with regard to the premises, which might operate as a burden upon them. It is submitted that the circumstances were such as ought to have put him on inquiry. [They cited on this point *London and South Western Ry. Co.* v. *Gomm.* (2)]

It is well settled that the surrender of a lease does not destroy sub-leases, and other subordinate interests in the land, which have been created under the lease: *Doe* d. *Beadon* v. *Pyke*. (3) So here the surrender by the lessee could not free the land from the burden of the restrictive covenant, and the plaintiff could not thereby be deprived of his right, which has been held to be in the nature of an equitable interest in the land.

[VAUGHAN WILLIAMS L.J. The doctrine of that class of cases relates to legal rights created under the lease.]

(1) 2 Ph. 774. (2) 20 Ch. D. 562.
(3) 5 M. & S. 146.

[They also cited *Mander* v. *Falcke* (1), *De Mattos* v. *Gibson* (2), and *Piggott* v. *Stratton*. (3)]

[FARWELL L.J. *Piggott* v. *Stratton* (3) seems to have been a case of a building scheme, and to have depended on the doctrine of estoppel by representation.]

*Cave, K.C.*, for the defendant, was not called upon to reply.

VAUGHAN WILLIAMS L.J. I think that this appeal must be allowed. This case has been very well argued, but really, when certain conclusions of fact are arrived at, there is very little left to argue. It cannot seriously be disputed that the proposition which I quoted from Ashburner's Principles of Equity, p. 75, is good law. It is as follows: "A purchaser for valuable consideration without notice can give a good title to a purchaser from him with notice. The only exception is that a trustee who has sold property in breach of trust, or a person who has acquired property by fraud, cannot protect himself by purchasing it from a bona fide purchaser for value without notice." The learned author cites as authorities for that proposition the cases of *Sweet* v. *Southcote* (4) and *Barrow's Case*. (5) Those cases seem to me to be conclusive authorities for the proposition stated by the author in the text, the terms of which shew that he had in his mind the words used by Jessel M.R. in giving judgment in the latter case. The learned Master of the Rolls there said (6): "The result was that Kimpton and Cox were absolute owners of paid-up shares as between them and the company, the consequence being that they had a right to sell them, and give a good title, not only to people who had no notice, but to people who had notice. The ultimate result, therefore, is that, though they sold to the appellant, or the appellant's father who had notice, those purchasers were entitled to hold the shares as paid up just in the same way as Kimpton and Cox could hold them. The only exception, and the well-known exception, to the rule which protects a purchaser with notice taking from a purchaser without notice is that which prevents a trustee buying back trust

(1) [1891] 2 Ch. 554.
(2) 4 De G. & J. 276.
(3) 1 De G. F. & J. 33.
(4) 2 Bro. C. C 66.
(5) 14 Ch. D 432.
(6) 14 Ch. D. 445.

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property which he has sold, or a fraudulent man who has acquired property by fraud saying he sold it to a bona fide purchaser without notice, and has got it back again. Those are cases to shew that a person shall not take advantage of his own wrong. But the present appellant had not done wrong: the shares had been sold for value. The appellant and his father were not trustees of the shares, and therefore they did no wrong in buying them back." Under these circumstances there is really to my mind only one question that we have to decide. So far as the landlord was concerned, if he had no notice, either actual or constructive, of the covenant entered into by the father in respect of No. 137, he became upon the surrender free to deal with the property unincumbered by any equity arising therefrom, and, that being so, the only question really left to be decided is whether the landlord had notice, either actual or constructive. So far as actual notice is concerned, it cannot be suggested that there was any evidence of such notice to the landlord. All that counsel for the plaintiff were able to say was that it was not proved as a fact that he had no notice, but to my mind the only possible inference which could be drawn from the facts in this case is that there was no such notice.

But then it is said that he had constructive notice. In my judgment there were no facts proved upon which a suggestion that there was constructive notice to him can properly be based. Upon that question the case of *In re Ford and Hill* (1) is really conclusive to shew that there is nothing in the present case to justify the conclusion that there was constructive notice to the landlord. The covenant relied upon was a covenant in respect of a different estate granted by a different landlord. It is suggested that, either on the surrender or on the grant of the new lease by the landlord of No. 137, there ought to have been inquiries or requisitions made by him, which, if they had been made, would have disclosed the existence of the covenant not to carry on a general butcher's business on the premises, but to my mind there was no obligation of any kind on the landlord to make any such inquiries or requisitions. Under these circumstances I think, with all respect to Scrutton J., that he arrived

(1) 10 Ch. D. 365.

at a wrong conclusion when he said, in substance, that there was constructive notice to the landlord because those inquiries were not made by him which reasonably ought to have been made. It appears to me that he must have forgotten for a moment that these were two distinct properties owned by different landlords, and that the landlord who accepted a surrender of the premises on which the pork butcher's business was carried on, and granted a new lease of them, had nothing to do with the other premises. There was, in my opinion, no failure on the part of the landlord to make any inquiry that ought reasonably to have been made by him, and from the omission to make which constructive notice to him could be inferred.

It must not be inferred from anything which I have said that I do not think that any wrong was done to the plaintiff, who took the assignment of the general butcher's shop, being induced thereto by the covenant not to carry on anything beyond the business of a pork butcher on the other side of the street. I think that a wrong was plainly done to him by what occurred, but one cannot, because a wrong was done to him, and one might be glad to throw the loss occasioned to him upon those by whom the wrong was done, derogate from the plain rights of the landlord, who, when the surrender was made and the new lease granted, had no notice of the restrictive covenant.

FLETCHER MOULTON L.J. I agree. I should have added nothing but for the fact that Vaughan Williams L.J. has said at the end of his judgment that he had no doubt that a wrong was done to the plaintiff by what occurred. I confess that, personally, I feel some doubt whether the covenant upon which the action is based had any reference to the interest of Isaac James Spooner as lessee of No. 137. After reading it, it looks to me rather as though the covenant was made by him as the person who was then carrying on that particular business of a pork butcher, and the word "assigns" in the covenant more probably refers to those who might in the future be assignees of that business from him than to persons who might become assignees of his interest in No. 137. It is not necessary, however, to decide that point, and I do not base my judgment upon it.

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FARWELL L.J. I am of opinion that the judgment of Scrutton J. cannot be supported for the reasons given by Vaughan Williams L.J. I only add a few words because I am not sure that I agree with the latter part of the judgments of either of my brethren. I do not, as at present advised, share the doubt suggested by Fletcher Moulton L.J., but, assuming that the construction of the covenant is in favour of the plaintiff on that point, I am not clear that there was anything wrongful in the proceedings of the younger defendant in the sense that they expose him to an action at law for breach of any contractual obligation. He has not entered into any covenant not to carry on the business of a general butcher at No. 137. The only question is whether the land in his hands is bound, so that he can be restrained from using it in a manner contrary to the covenant. That depends on two propositions. The first is that the lessor, when he accepted the surrender, had notice, either actual or constructive, of the restrictive covenant entered into by his lessee. The onus in such a case of shewing absence of notice lies, I think, on the defendant. It was held in the Court of Appeal in *Attorney-General* v. *Biphosphated Guano Co.* (1) that under such circumstances it is not a case of, first, a defence that the defendant is a purchaser for value, and then a reply that he had notice, but of a single defence that the defendant is a purchaser for value without notice, the onus of proving which is on the defendant. But I think that here it was sufficiently proved that the lessor was a purchaser for value without notice. The evidence is all one way. The lessee came with his lease to the lessor's agent, and said that he wanted to surrender his lease, by reason of bad health and want of money, very good reasons, quite sufficient to satisfy the lessor that there was good bona fide ground for his wishing to surrender the lease. It is suggested that it thereupon became the duty of the lessor's agent to inquire whether there was any incumbrance or charge, or other reason why he should not surrender. I think that suggestion is disposed of by *In re Ford and Hill.* (2) It was not necessary for him to make any such inquiry, and it need not have been answered, if made. The result is that there

(1) (1879) 11 Ch. D. 327, at p. 337. (2) 10 Ch. D. 365.

was in this case nothing whatever to put the lessor on inquiry. I cannot help thinking that Scrutton J. a little misunderstood, if I may say so with the greatest respect, the rule in *Patman* v. *Harland* (1) and cases of that kind. Those were cases in which there was a title to the property which, if inspected, would have shewn some defect in the title, or something which would have put the purchaser on inquiry which would lead him to discovery of that defect. Here there was nothing of the kind. There was a document, which contained a restrictive covenant, but which formed no part of the title of the surrenderor to the surrendered lease, and no amount of inspection of the title would have shewn it. It is where the purchaser for value refrains, either under conditions of sale, or because he chooses, from inspection of a title which he ought properly to inspect, that he is taken to have constructive notice of what he would have discovered if he had adopted the usual and proper course of inspection.

The other point, upon which I venture to differ from Scrutton J., is this. He relied upon a series of cases dealing with legal rights dependent upon a lease, such as the case of *Doe* d. *Beadon* v. *Pyke*. (2) They have nothing to do with the question of an equitable right binding on the conscience. All the ground is cleared when it is shewn that the lessor became possessed of a title to the surrendered premises freed from the lease and anything arising out of the lease. It is urged that the son knew of the restrictive covenant, and that he has the lease, and therefore he ought to be held liable in respect of and to the extent of his interest. I can only reply that two hundred years ago that might possibly have been open to argument, but now the question is entirely concluded by authorities, which rest upon the ground that, in justice to the owner of land who had no notice when he acquired the land, it would not be right to hamper his power of dealing with his own land, because certain persons, who possibly would be the only customers for the land likely to pay the best price, have such notice. It is put by Lord Hardwicke in *Lowther* v. *Carlton* (3) as follows: "It is certainly the rule of this Court that a man who

(1) 17 Ch. D. 353. (2) 5 M. & S. 146.
(3) 2 Atk. 242; Barn. 358.

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is a purchaser with notice himself from a person who bought without notice may shelter himself under the first purchaser or otherwise it would very much clog the sale of estates." The case of *Sweet* v. *Southcote* (1) is stronger still. There the bill was to discover whether the defendant, who was assignee of a mortgage, had or had not notice that the original mortgagor was only tenant for life, stating that the title deed, by which this appeared, was in the defendant's hands. The defendant pleaded that he was assignee of the mortgage, for valuable consideration, and through many assignments, from persons who had no notice. It was argued that this plea was not good, for it should have stated that the defendant personally had no notice; but it was held that it was good, because the defendant was entitled to avail himself of those through whom he claimed being purchasers without notice, whether he had notice himself or not.

It is impossible for us or any Court to upset law which has been settled for so many years. Therefore, when once the land got into the lessor's hands, he was free to deal with it, and to demise it free from any restrictive covenant to a person who wished to purchase or take a lease of it though such person had notice. This is not an action for damages against the son, nor am I prepared to say that any such action would lie. On these grounds I think that the appeal should be allowed.

*Appeal allowed.*

Solicitor for plaintiff: *J. Banks Pittman.*

Solicitor for defendant I. J. Spooner: *C. Levick.*

Solicitors for defendant G. L. Spooner: *Mitchell, Lucas & Mitchell.*

(1) 2 Bro. C. C. 66.

E. L.

[IN THE COURT OF APPEAL.]

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*March* 17, 20, 21, 22; *April* 11.

## LLOYD *v.* GRACE, SMITH & CO.

*Principal and Agent—Authority of Agent—Fraud of Agent—Liability of Principal.*

The defendant, a solicitor, employed a clerk under an agreement in writing as his "conveyancing manager" and "generally as the managing clerk of the employer in the business of solicitor carried on by the latter." The plaintiff went to the defendant's office, and there saw the managing clerk, whom she consulted as to her investments, with which she was dissatisfied. Acting upon his advice, she handed to him the title deeds of certain freehold property and also a mortgage to secure advances made by her upon certain other property, and she also executed a conveyance into the managing clerk's name of the legal estate in the freehold and a transfer of the mortgage to him. The managing clerk deposited the deeds of the freehold property as security for an advance to himself, which he retained for his own private use, and called in the mortgage of the other property and misappropriated the money. The defendant was ignorant of the whole transaction until after the discovery of his clerk's fraud; the plaintiff believed thoughout that she was a client of the defendant:—

*Held* by Farwell and Kennedy L.JJ., that in taking into his own name a conveyance of the plaintiff's freehold property and a transfer of her mortgage the managing clerk was not acting within the scope of his authority as managing clerk of the defendant, and that the defendant was not liable to recompense the plaintiff for the loss sustained by her through the fraudulent act of the managing clerk.

*Held* by Vaughan Williams L.J., that upon the facts there was evidence of such a holding out by the defendant of the managing clerk as being authorized to act on his behalf as would estop the defendant from denying the authority of his managing clerk to deal with the plaintiff's deeds.

APPEAL of the defendant (1) from the judgment of Scrutton J. in an action tried with a special jury at Liverpool.

The statement of claim alleged that the plaintiff, a widow, in the year 1909 instructed the defendant as her solicitor to sell certain freehold property at Ellesmere Port belonging to her, the instructions being given to one Sandles, the managing clerk

(1) The defendant, Mr. F. Smith, carried on business under the firm name of Grace, Smith & Co., and the word "defendant" is therefore used in the singular in this report.

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of the defendant, to whom the deeds relating to the property were handed by the plaintiff; that the defendant had not sold the property, but refused to deliver up the deeds to the plaintiff; and the plaintiff claimed in detinue for their return. It was further alleged that the plaintiff had instructed the defendant, also through Sandles, to call in a sum of 450*l.* secured on a mortgage of certain property in Hartington Road, Liverpool, the mortgage deed relating to which she had also handed to Sandles, and she claimed the sum of 450*l.* as having been received by the defendant to her use. The defence put in issue the material allegations in the statement of claim. Alternatively, as to the Ellesmere Port freehold property it was alleged that the plaintiff had conveyed it to Sandles, who had mortgaged it to the Union Credit Bank, Limited, and had handed the title deeds as legal owner to the bank; that the defendant had subsequently paid off the mortgage and had become entitled to the legal estate subject to any right of the plaintiff or Sandles to have the property reconveyed on payment of the amount due on the mortgage. As to the Hartington Road property, it was alleged that the plaintiff had by a writing under seal assigned and transferred to Sandles the 450*l.* secured by the mortgage, who had afterwards assigned to one Littler the debt of 450*l.* and all securities therefor, whereupon the plaintiff ceased to have any interest in the mortgage. The reply stated that the execution by the plaintiff of the various indentures was procured by the fraud of Sandles acting in the course of his employment and within the scope of his authority as managing clerk of the defendant; that Sandles falsely and fraudulently told her that her execution of the indentures was necessary and usual to enable the defendant to sell the freehold property and to call in the money secured by the mortgage; and that she was induced by the false and fraudulent statement to execute the indentures.

The following statement of facts is taken in substance from the written judgment of Vaughan Williams L.J.

On January 11, 1910, the plaintiff called at the office of Mr. F. Smith, a solicitor carrying on business at Liverpool under the style of Grace, Smith & Co. She there saw one Sandles, the conveyancing manager to Mr. Smith, and consulted him as to her

investments, with which she was dissatisfied. The interview took place in Sandles' room at the defendant's office, to which the plaintiff had gone for advice as a client of the firm. Sandles told the plaintiff she was not getting enough for her money, and told her to bring the deeds relating both to the freehold property and to the mortgage on the next day. On January 12 the plaintiff again came to the defendant's office, bringing the deeds with her. As a result of another interview with Sandles, she handed the deeds to him and instructed him to sell the freehold property and to call in the mortgage money. The form of reinvestment was discussed, and Sandles suggested a reinvestment in certain companies not specifically named, which he said would pay dividends varying between 10 and 20 per cent., and that he would guarantee her 10 per cent. Sandles then handed her two documents to sign, which she did not read but signed, believing, as she said, that they were "something which I had to sign before the sale could be proceeded with." The documents were brought into the room by Sandles, accompanied by a clerk (presumably in the employ of the defendant), Sandles telling the clerk to shew the plaintiff where to sign. The documents were, respectively, a conveyance by the plaintiff to Sandles of the Ellesmere Port property and a transfer of the Liverpool mortgage. Sandles retained the deeds relating to the mortgage, giving a receipt for them in his own name. On the evening of the same day Mr. Edwards, a friend of the plaintiff, told her that the receipt in Sandles' name was very curious, and advised her to look into the matter and anyhow to get the firm's receipt, and the plaintiff thereupon wrote to Sandles to say that she had changed her mind respecting the reinvestment of her property and asking him to consider her instructions cancelled. On January 15 Sandles wrote to the plaintiff from the defendant's office acknowledging the receipt of her letter and asking her to call on the following Monday, January 17. On that day the plaintiff called at the office and saw Sandles, who told her that he had already called in the mortgage and advised her to leave the deeds with him. The plaintiff asked him for a receipt in the firm's name for her deeds, and Sandles gave her one for both sets of deeds, which he signed "Grace, Smith & Co., per C. W. S."

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On January 13 Sandles had mortgaged the deeds of the Ellesmere Port property to the Union Credit Bank for a real advance of 378*l.* and interest, which was expressed in the mortgage as being 550*l.* On the same day he had called in the money secured on the mortgage of the Liverpool property for payment off in April. On March 12 Sandles wrote a letter to the plaintiff, enclosing a cheque for interest on the Liverpool mortgage and telling her that the mortgage would be paid off in April. On April 5 Sandles received 450*l.* from one Littler, to whom he had transferred the mortgage debt on the Liverpool property; he used this money to pay a private debt of his own. On April 20 Sandles wrote to the plaintiff from his private address asking her to call on the following Friday, when the 450*l.* and interest would be ready for her; but the plaintiff did not then, or at any time, call on Sandles at his private address; she, however, had an interview with Sandles on April 22 at the office. On April 28 Sandles called on the plaintiff and handed her his cheque for 450*l.*, saying, however, that the money would not be ready till next week; the cheque was never met, and on May 3 he gave her another cheque and asked for a receipt, which she did not give him.

About the end of April the fraud of Sandles was discovered by the defendant, who had an interview with the plaintiff on April 29. At this interview he informed her that he had required Sandles to repay the money which he had received in respect of the mortgage of the freehold property to the Union Credit Bank, and that Sandles had promised to send him 450*l.*, but had in fact only sent 250*l.* This sum the defendant offered to the plaintiff, who refused it; on the advice, however, of the defendant, the plaintiff assented to his suggestion that he should add 150*l.* to the 250*l.* and see whether the bank would surrender the mortgage on payment to them of 400*l.* The defendant, according to his own evidence, further told the plaintiff that, if he paid the 150*l.* to redeem the mortgage, he should of course have a lien on the mortgage until she repaid him that amount; the plaintiff, however, denied that the defendant said this. In the event the bank accepted the 400*l.*, the amount actually advanced having been in fact 378*l.* The deeds so redeemed from the bank were

in the defendant's possession when the writ was issued in the present action. No charge was made throughout the proceedings against the personal honour of the defendant.

The questions put by Scrutton J. to the jury, with their answers thereto, were as follows:—

1. In receiving the deeds and taking instructions to sell the property and call in the mortgage debt did Sandles profess to act in his private capacity or as conveyancing manager to Grace, Smith & Co.?—He professed to act as conveyancing manager to Grace, Smith & Co.

2. If he professed to act as conveyancing manager to Grace, Smith & Co., was he in reality acting on his master's behalf or was he in reality acting on his own behalf and for his own benefit?—He acted in reality on his own behalf and for his own benefit.

3. In receiving the deeds of the property and the mortgage did he act (*a*) in the course of his business as conveyancing manager?—Yes. (*b*) For his master's benefit?—No.

4. In taking a transfer of the Ellesmere Port property and pledging it did he act (*a*) in the course of his services as managing clerk?—No. (*b*) For his master's benefit?—No.

5. In taking a transfer of the mortgage to himself did Sandles act (*a*) in the course of his business as managing clerk?—No. (*b*) For his master's benefit?—No.

6. In calling in the mortgage debt and transferring it did he act (*a*) in the course of his master's business?—Yes. (*b*) For his master's benefit?—No.

The jury added to their findings the following rider:—"The jury are of opinion that throughout the whole history of the transaction Mrs. Lloyd believed she was dealing with Messrs. Grace, Smith & Co."

After argument, Scrutton J. gave judgment for the plaintiff for (1.) the return of the deeds of the Ellesmere Port property free and unincumbered; (2.) payment by the defendant of 450*l.*; (3.) costs.

At the conclusion of the trial an application for leave to amend the pleadings was made on behalf of the plaintiff; it is thought desirable to describe this application in the exact language

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used by Scrutton J. in his judgment: "After the jury had made their findings and been discharged, and at the close of the legal arguments, Mr. Tobin for the plaintiff applied to me to amend by adding a claim in contract based on the firm's undertakings to sell the property or afterwards keep the deeds, and to call in the mortgage money, and negligently and improperly carrying out their undertaking. Mr. Greer for the defendant objected, and I held that it was too late after the jury had given their findings and been discharged to raise a new case of this description, and I refused to allow the amendment. Mr. Tobin had, however, before applied to me to make any formal amendments as to the allegations, or relief, consistent with the pleaded causes of action, and this I was willing to do, and I understood it was not objected to. Further, on considering with counsel the questions for the jury and discussing whether a question was necessary as to the value of the deeds if not delivered, it was agreed by counsel that, if defendant was liable in respect of the Ellesmere Port cottages, he would deliver the deeds unincumbered, and in respect of the mortgage transaction he would pay 450*l*."

By an agreement between counsel at the trial the learned judge had power to find any necessary facts in addition to the facts found, and acting upon this agreement Scrutton J. found as facts in his judgment "that it was within the scope of Sandles' employment to advise clients, who came to the firm to sell property, as to the best legal way to do it, and the necessary documents to execute; that the client did rely on the representations of Sandles professing to act on behalf of the firm that the documents in question were necessary to facilitate and carry out the sale of the land for her; that she did not know that she was signing conveyances to Sandles outside the scope of his authority, and that she was justified in relying on the representations of Sandles without reading and trying to understand the documents tendered to her."

The defendant appealed, asking for judgment or for a new trial. The grounds of appeal were (1.) that there was no evidence to go to the jury in support of the claim; (2.) that there was no evidence to go to the jury in support of the jury's

finding in answer to question 6 (*a*); (3.) that there was no evidence on which Scrutton J. was entitled to find that it was within the scope of Sandles' authority to obtain the plaintiff's execution of the conveyance to him and the transfer of the mortgage to him (4.) that the finding of the judge mentioned in the third ground of appeal was inconsistent with the verdict; (5.) that on the facts as found by the jury the defendant was entitled to judgment; (6.) that the finding No. 1 of the jury was contrary to the weight of evidence.

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*Greer, K.C.*, and *Cuthbert Smith*, for the defendant. The defendant is entitled to judgment upon the findings of the jury as they stand, though there was no evidence to warrant the finding that Sandles was acting in the course of his master's business in his dealings with the plaintiff; the true inference from the facts given in evidence was that Sandles treated the matter as a piece of private business of his own and not as part of the defendant's business at all. But assuming that it was part of the master's business, the question of the defendant's liability for the acts of Sandles can only be determined by reference to the general law of agency, and in *Barwick* v. *English Joint Stock Bank* (1) Willes J. laid down the governing principle in these terms: "But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." The doctrine that the act of the agent must be for the master's benefit has been followed in many subsequent cases, such as *British Mutual Banking Co.* v. *Charnwood Forest Railway* (2), where a company were held not to be liable for the acts of their secretary, who had for his own benefit given untrue and fraudulent answers to questions put to him as secretary as to the validity of certain debenture stock of the company, and *Ruben* v. *Great*

(1) (1867) L. R. 2 Ex. 259, at p. 265. (2) (1887) 18 Q. B. D. 714.

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*Fingall Consolidated.* (1) In the present case the particular acts which the plaintiff performed at the instigation of Sandles, and which have given rise to the whole of this litigation, were the conveyance by the plaintiff to Sandles of the legal estate in the freeholds and the transfer by her to him of the mortgage; these are acts which cannot possibly be deemed to be within the authority of a solicitor's managing clerk: *Tendring Hundred Waterworks Co.* v. *Jones.* (2) The plaintiff was bound to know of the existence of such a limitation of authority, and she cannot make the principal liable if she was in fact ignorant of it: *Grant* v. *Norway.* (3) The case of *Hambro* v. *Burnand* (4), upon which the plaintiff relies as an authority in her favour, is clearly distinguishable upon the facts, for there the agent, in contracting on behalf of his principal, had acted within the terms of a written authority given to him by his principal, who could not therefore repudiate his liability on the contract on the ground that his agent in making it had acted in his interests and not in those of the principal: see also *Jobson* v. *Palmer* (5); *Limpus* v. *London General Omnibus Co.* (6); *Croft* v. *Alison.* (7) It is impossible to contend that the assignment of the plaintiff's deeds was obtained by the fraud of Sandles acting within the scope of his authority. There was no evidence of holding out by the defendant or of any other act on his part which would estop him from setting up his agent's want of authority. Further, the mortgage deeds were never in the defendant's possession, but were transferred by Sandles to an assignee, who still holds them. And it is not unimportant that the original receipt for the plaintiff's deeds was given by Sandles in his own name, and not in that of the defendant's firm. [They also cited *George Whitechurch, Ld.* v. *Cavanagh* (8); *Russo-Chinese Bank* v. *Li Yau Sam* (9); *Cheshire* v. *Bailey.* (10)]

*Tobin, K.C.*, and *J. A. Johnston*, for the plaintiff. Accepting the findings of the jury, the plaintiff is entitled to the judgment

(1) [1906] A. C. 439.
(2) [1903] 2 Ch. 615.
(3) (1851) 10 C. B. 665.
(4) [1904] 2 K. B. 10.
(5) [1893] 1 Ch. 71.
(6) (1862) 1 H. & C. 526.
(7) (1821) 4 B. & Al. 590.
(8) [1902] A. C. 117.
(9) [1910] A. C. 174.
(10) [1905] 1 K. B. 237.

given in her favour by Scrutton J. Her case is that the defendant put Sandles in a position of authority, with actual authority on his behalf to take instructions from the defendant's clients, to accept deeds from them, and to give them advice on behalf of the defendant's firm; it was not perhaps a specific authority to do the particular act which Sandles in fact did, but rather to do the class of act of which the act that he did was an example. The contract made by Sandles with the plaintiff was made by him on behalf of his master's firm and was within the scope of his authority; he professed throughout to act on behalf of his master. It is within the scope of the authority of a solicitor's managing clerk to receive instructions from clients, to take charge of their deeds, and to give advice in consultation; it is immaterial to the plaintiff that at the time when Sandles was so acting within the scope of his authority he was minded to commit a fraud.

[VAUGHAN WILLIAMS L.J. The plaintiff seems to have relied chiefly on tort in the Court below; what is the contract which you allege?]

An implied contract, by which the plaintiff undertook to pay the defendant's bill of costs in consideration of his receiving her deeds and giving her advice and carrying out her instructions to sell her Ellesmere Port property to a third party, and calling in for her the money lent on mortgage, and further in consideration of the defendant agreeing to return her deeds if her instructions should not be carried out; it is a contract implied by law from the facts. There is no evidence to justify the suggestion that the plaintiff was a private client of Sandles'; not only did she believe all through that she was a client of the defendant, but under his agreement of service as conveyancing manager Sandles had no right to engage in private business at all. There was ample evidence to justify the jury's first answer and their rider, also the finding of fact by Scrutton J. that in advising the plaintiff to do as she did Sandles professed to be acting on behalf of his master. If at the time when he received the plaintiff's deeds Sandles was acting within the authority given him by his master, it is immaterial that he was also acting for his own benefit. The general rule laid down by

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Willes J. in *Barwick* v. *English Joint Stock Bank* (1) is too wide, and the words "for the master's benefit" are not essential; they are, indeed, superfluous. The rule is better stated by Lord Herschell in *Thorne* v. *Heard* (2), where he said, "It appears to me perfectly clear that in order to charge any person with a fraud which has not been personally committed by him the agent who has committed the fraud must have committed it while acting within the scope of his authority, while doing something and purporting to do something on behalf of the principal. If the person is doing something within the scope of his authority and purporting to do it for his principal, although in doing it he commits a wrong which his principal neither sanctioned nor intended, the principal may be liable." The facts of the present case bring it precisely within the principle there laid down.

[FARWELL L.J. referred to *Bishop* v. *Countess of Jersey*. (3)]

In that case it was impossible for the customer of the bank, who was defrauded by one of the bank partners, to think that such a profession as was made by the fraudulent partner could be made by him on behalf of the firm. Here the plaintiff believed on good grounds that she was dealing with the defendant's firm. The defendant cannot rely upon the fact of the conveyance of her freehold property by the plaintiff to Sandles, or of her executing a transfer of her mortgage to him; the deeds were in law not the plaintiff's deeds and upon a plea of non est factum must have been held void. [They also cited *Trott* v. *National Discount Co.* (4); *Kennedy* v. *Green* (5); *Hunter* v. *Walters* (6); *Mackay* v. *Commercial Bank of New Brunswick* (7); *Jacobs* v. *Morris* (8); *Montaignac* v. *Shitta*. (9)]

*Greer, K.C.*, in reply.

*Cur. adv. vult.*

April 11. VAUGHAN WILLIAMS L.J. read the following judgment:—[After stating the facts as above set out, his Lordship proceeded.] At the trial Scrutton J. put six specific

(1) L. R. 2 Ex. 259, at p. 265.
(2) [1895] A. C. 495, at p. 502
(3) (1854) 2 Drew. 143.
(4) (1900) 17 Times L. R. 37.
(5) (1834) 3 My. & K. 699.
(6) (1871) L. R. 7 Ch. 75.
(7) (1874) L. R. 5 P. C. 394.
(8) [1902] 1 Ch. 816.
(9) (1890) 15 App. Cas. 357.

questions to the jury, which were answered by them. But unfortunately one cannot decide this case upon the facts ascertained by their answers because, as recited by the learned judge in his judgment, it was agreed by the counsel on either side "that any supplementary findings of fact which it becomes necessary to decide should be decided by me"; and the learned judge goes on to say, "the facts as hereinafter stated are either admitted or found by me under this agreement." Besides the facts stated in the narrative portion of his judgment, Scrutton J. finds specifically certain facts for the purpose of one point specified in his judgment. I cannot help saying that I think it was a very unfortunate thing that any such agreement was made; but I am told that such agreements as to finding facts as distinguished from inferences of fact are not unusual. The learned judge treats the agreement, not as one entitling him to draw inferences of fact from the findings in fact of the jury, but as one entitling him to find facts; the result is that one has not to deal with a trial before a judge alone, in which he finds the facts, but with a trial in which the finding of the facts is the mixed function of the judge and jury. I propose, however, to set out the findings in fact by the learned judge as well as the answers of the jury already set out, reserving till later the question whether under these circumstances, in case we allow the appeal, there ought to be judgment or a new trial.

[After reading the questions put to the jury and their answers thereto, his Lordship continued.] The learned judge in his judgment says in respect of the findings of the jury which are appended to the judgment, "I should say as to the first part of the sixth finding that, at the time I asked the question and the jury answered it, our attention had not been called to the fact that Sandles called in the money in his own name and transferred the mortgage debt in his own name; I think under the circumstances there was no evidence on which the jury could answer question 6 (*a*) in the way they did." The first part of this question and answer was as follows: "In calling in the mortgage debt and transferring it did he act in the course of his master's business?—Yes." In order to understand this answer of the jury, I think that one should read question 6 (*b*), which

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asked whether Sandles acted for his master's benefit and was answered in the negative. Having regard to this answer to 6 (*b*), I think that the jury by their answer to 6 (*a*) may well have meant that Sandles was acting in the course of his business when he advised in his room at the office a client of the firm to have the mortgage called in and the transfer taken in his own name. The jury were not answering a question of law but a question of fact. It is very desirable to bear in mind the fact that no charge was made at the trial against the personal honour of the defendant, for it should lead the Court to avoid drawing any conclusions from the evidence or from the findings of the judge which are inconsistent with honourable conduct on his part. It must also be remembered that on the uncontradicted evidence of the plaintiff she never saw Sandles, who was quite unknown to her, until she saw him in the defendant's office as his managing clerk. The defendant's letter of June 7 to the plaintiff's solicitor is evidence that he knew that Sandles from his (defendant's) office was conducting business with the plaintiff, for he says in that letter, "He (Sandles) told me that Mrs. Lloyd was a private friend and I either in my own or my firm's name have never had any costs whatever from her." He also seems to have seen the entries in the call-book of calls by the plaintiff.

I have now furnished the details of the material facts and deeds, the greater part of which are to be found in the narrative portion of the judgment of Scrutton J. The other facts which I have mentioned are based on uncontradicted evidence and have been included by the learned judge for the purpose of making a connected narrative.

I will now set forth the findings in fact by Scrutton J. with reference to the answer which the learned judge thinks the plaintiff might make to the defendant's contentions. The learned judge deals first with the plaintiff's contention that she can get rid of the effect of the signature to the deeds in Sandles' favour by denying that she understood what she was signing. He negatives this contention, saying that the case is covered rather by *Hunter* v. *Walters* (1) than by *Foster* v. *Mackinnon*. (2) He

(1) L. R. 7 Ch. 75. (2) (1869) L. R. 4 C. P. 704.

quotes from *Hunter* v. *Walters* the language of Mellish L.J. (1): "When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then, in my opinion, a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed." Scrutton J. prefaces this quotation by saying, "But on consideration I think that, as the lady knew she was signing something affecting her estate and trusted in her solicitor, the case is governed by the decision in *Hunter* v. *Walters*." (2) I regard this statement as a finding in fact by the learned judge. He then says: "But I think an answer to Mr. Greer's contention may be framed thus. 'I have traced the deeds into your custody, and you tell me your servant by an act outside the scope of his authority has made away with them; that is no answer to me, nor is it any better answer because his fraudulent act also deceived me. You put him there to advise people coming to have their land sold as to the proper course to take. He professed to act for you and I believed he was acting for you. He told me to sign a document to carry out my instructions to him to sell the property for me. That was what you had put him there to do, and was, as he represented it, one of the class of acts he was employed to do. It is the fraudulent act of your servant which has taken the deeds from your custody. It would be no defence to you that it was a fraud on you, and it is not made any better by being a fraud on me.'" Having put this answer into the mouth of the plaintiff, he proceeds to say: "For the purposes of this point I find as facts that it was within the scope of Sandles' employment to advise clients, who came to the firm to sell property, as to the best legal way to do it and the necessary documents to execute; that the client did rely on the representations of Sandles professing to act on behalf of the firm; that the documents in question were necessary to facilitate and carry out the sale of the land for her; that she did not know that she was signing conveyances to Sandles outside the scope of his employment, and that she was justified in relying on the representations of Sandles without reading and trying to

(1) L. R. 7 Ch. at p. 88. (2) L. R. 7 Ch. 75.

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understand the documents tendered to her; and on these facts with some hesitation I have come to the conclusion that this is a good answer to Mr. Greer's argument and that the defendant has no answer to a claim for the return of the deeds entrusted to his custody. I therefore give judgment for the return free of incumbrances of the deeds of the Ellesmere Port property which he has, and as he cannot return the mortgage deeds free of incumbrances I give judgment for their value, 450*l*."

In my judgment, it is impossible on these facts to find that Sandles was in the commission of these frauds acting within the scope of his employment or within any authority created by the terms of his engagement, nor do I think that on these facts the plea of non est factum will avail the plaintiff; as against a transferee without notice the deeds she signed are voidable, not void. But I think that there is considerable evidence to shew that the defendant so held out Sandles as acting in his place in the office as his alter ego, with full authority to advise any client who came to the office, and that he is estopped from denying the authority of Sandles at least to receive the deeds, that is, the title deeds of the plaintiff to the Ellesmere Port freehold and the mortgage deed of the Liverpool property. The terms of the written engagement of Sandles are in my opinion evidence to shew that he had authority to conduct his private business from his room in the defendant's office, an important room where clients of the defendant were habitually received and advised without any personal intervention on his part. The calls of such clients were entered in the call-book of the office. Sandles was allowed to have in this room a private safe of his own, and was allowed to use for whatever purposes he chose, whether his private business or the firm's business, the services of the staff.

To hold that the defendant is thus estopped is no departure from the judgment of Sir James Shaw Willes in *Barwick* v. *English Joint Stock Bank* (1), so often affirmed in subsequent cases in the House of Lords and the Court of Appeal. In one of the cases in which it was affirmed by the House of Lords, *Ruben* v. *Great Fingall Consolidated* (2), Lord Davey says, quoting Willes J., "The general rule is that the master is answerable for every such

(1) L. R. 2 Ex. 259. (2) [1906] A. C. 439, at p. 446.

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wrong of the servant or agent as is committed in the course of the service and for the master's benefit," which quotation he prefaces by saying that "every part of the legal proposition stated by Willes J. in his well-known judgment in *Barwick* v. *English Joint Stock Bank* (1) is of the essence of it." In the judgments in that case delivered in the House of Lords estoppel is also discussed. Lord Macnaghten says (2), "The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation there can be no estoppel." I gather from these words that, without departing from the rule laid down by Willes J. in *Barwick* v. *English Joint Stock Bank* (3), it would, apart from the course of the trial, be open on the evidence in the present case to inquire if the defendant had done anything to represent or lead to the belief that Sandles, whatever were the name of his clerkship and the terms of his employment, when he advised the plaintiff at the defendant's office, was acting with his (defendant's) authority, provided the business was of a character which the defendant habitually allowed Sandles to execute in his office with the assistance of his staff. But no such case was made out at the trial so far as the questions left to the jury are concerned. No estoppel can be based on the findings of the jury, which do not deal with holding out.

Scrutton J., however, in the words which suggest an answer to defendant's criticism on the plaintiff's contention that the deeds signed by her did not bind her because she was misled as to their nature, does more or less find facts on which estoppel might be based, and I think that his judgment for the plaintiff is meant to be based on estoppel. He is dealing with what has been called the non est factum point. He holds that prima facie that point fails, because he finds that the lady knew she was signing something affecting her estate and trusted in her solicitor, and he holds that the case is therefore governed by *Hunter* v. *Walters* (4), and that the transfer of the Liverpool mortgage to Littler and the pledge of the Ellesmere Port property to the Union Bank are therefore voidable and not void, and therefore

(1) L. R. 2 Ex. 259.
(2) [1906] A. C. at p. 444.
(3) L. R. 2 Ex. 259, at p. 265.
(4) L. R. 7 Ch. 75.

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good in the hands of a transferee for value without notice. Scrutton J. in effect says that the question is not between the plaintiff and the transferee without notice; such title is good against her as between them; but that the question is what answer the defendant has to her claim against him for not returning her mortgage deed; and it is in reference to this that the learned judge says, "'I have traced the deeds into your custody, and you tell me your servant by an act outside the scope of his authority has made away with them; that is no answer to me, nor is it any better answer because his fraudulent act also deceived me. You put him there to advise people coming to have their land sold as to the proper course to take. He professed to act for you and I believed he was acting for you. He told me to sign a document to carry out my instructions to him to sell the property for me. That was what you had put him there to do and was, as he represented it, one of the class of acts he was employed to do. It is the fraudulent act of your servant which has taken the deeds from your custody. It would be no defence to you that it was a fraud on you, and it is not made any better by being a fraud on me.' For the purposes of this point I find as facts that it was within the scope of Sandles' employment to advise clients who came to the firm to sell property as to the best legal way to do it, and the necessary documents to execute; that the client did rely on the representations of Sandles professing to act on behalf of the firm that the documents in question were necessary to facilitate and carry out the sale of the land for her; that she did not know that she was signing conveyances to Sandles outside the scope of his employment, and that she was justified in relying on the representations of Sandles without reading and trying to understand the documents tendered to her; and on these facts, with some hesitation, I have come to the conclusion that this is a good answer to Mr. Greer's argument and that the defendant has no answer to a claim for the return of the deeds entrusted to his custody."

As I understand it, the ground of the learned judge's judgment is not that Sandles was acting for the benefit of his employer in receiving the deeds and taking the instructions to sell the property and call in the mortgage. The answer of the jury to

question 2 makes it impossible to say that in so doing he was in reality acting on his master's behalf. The answers to questions 1 and 3 leave it open to the plaintiff to say that Sandles throughout professed to act as conveyancing manager to Grace, Smith & Co., that is, to the defendant, and that in receiving the deeds of the property he acted in the course of his business as conveyancing manager. Answer 4, however, prevents the plaintiff from saying that, in taking the transfer of the Ellesmere Port property and pledging it, Sandles acted in the course of his services as managing clerk or for his master's benefit. And the same answer is given in respect of the transfer of a mortgage of the freehold to himself. The answer to question 6 by the jury was that in calling in the mortgage debt, and transferring it to Littler, Sandles did act (*a*) in the course of his master's business, but (*b*) not for his benefit. Scrutton J. held that there was no evidence upon which the jury could find their answer to question 6 (*a*), and it is difficult to reconcile that answer with the answer given to question 6 (*b*). The rider of the jury is in favour of the plaintiff in that it finds that throughout the whole history of the transaction the plaintiff believed that she was dealing with Grace, Smith & Co., that is, with the defendant.

I do not see how the judgment of Scrutton J. can possibly be supported; on the findings of the jury apart from estoppel the case clearly falls within the rule laid down by Willes J. in *Barwick* v. *English Joint Stock Bank.* (1) It is to be observed that every question deals with the authority of Sandles as conveyancing manager or managing clerk, and no question is asked which has any direct bearing on holding out or the facts which would support estoppel, and plaintiff's counsel did not ask to have such questions put to the jury. The facts going to shew the holding out were so far undisputed that both parties seem to have been willing to leave the question of holding out entirely to the judge. At all events I do not find that on the argument on further consideration before the judgment any serious objection was made to his dealing with both facts and conclusions on this point, and thus it happens that the question of estoppel, and of the findings to support it, is dealt with only in the judgment and the

(1) L. R. 2 Ex. 259.

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findings of the learned judge therein; and the question arises whether, if the appeal is allowed, under those circumstances the proper judgment for us to give in this Court is judgment for the defendant or for a new trial. I think that there is evidence that there was such a holding out as would estop the defendant from proving that Sandles had no authority to receive the deeds and take the instructions which were given him, even though at the time he took the instructions and received the deeds Sandles was minded to commit a fraud. The defendant selected Sandles and put him in the position in which the plaintiff had a right to infer that he had authority to take the instructions and receive the deeds. Then as to executing the transfers, did the defendant hold out Sandles as his agent from whom his clients might safely take instructions? I think that Scrutton J. by his judgment intends to find that the defendant did hold out and represent Sandles to be his agent to advise; if he did, the bailee cases, like *Cheshire* v. *Bailey* (1), seem to have no application; but for reasons which I have already set forth the questions of fact upon which estoppel would have to be based were not left to the jury. I personally should have been disposed to dismiss this appeal, if the findings in fact by Scrutton J. had been more definite, and if the "holding out" point had been more fully emphasized before the jury. Very little evidence, having regard to the story of this case as told by the witnesses, would have been sufficient to establish the holding out, and I think that we have on hearing the appeal all the powers that Scrutton J. had under the agreement and to find as a fact that Sandles was allowed by the defendant to have ostensible authority to advise, and I should be prepared to find (acting under the agreement) such ostensible authority as a fact. I have deliberately refrained from offering any opinion as to whether or not the defendant could take advantage of the title of the transferee without notice without relying on Sandles' acts, or whether he comes within the only exception to the rule that a purchaser for valuable consideration can give a good title to a purchaser from him with notice, by reason of his being through the acts of Sandles a trustee for the plaintiff: see *Pilcher* v. *Rawlins*. (2) Even without the powers

(1) [1905] 1 K. B. 237. (2) (1872) L. R. 7 Ch. 259.

conferred on the judge by agreement, the inference is difficult to resist, but, having regard to the course of the trial and to the view of my colleagues, I think we ought to order a new trial, not, however, without some doubts as to whether, having regard to the power of drawing inferences of fact given to the Court of Appeal by Order LVIII., r. 4, we ought not to dismiss this appeal.

FARWELL L.J. read the following judgment:—It is in my opinion impossible for this or any other Court to overrule the statement of the law by Willes J. in the Exchequer Chamber in *Barwick* v. *English Joint Stock Bank* (1), or qualify it by striking out the words "and for the master's benefit," as Scrutton J. suggests. The law was stated in the same terms before that case by Holt C.J. in *Turberville* v. *Stampe* (2), by Lord Abinger C.B. in a judgment said to have been penned by Lord Wensleydale in *Huzzey* v. *Field* (3), and by the Exchequer Chamber in *Limpus* v. *London General Omnibus Co.* (4), and has been restated and adopted in many cases since, e.g. in the Privy Council in *Mackay* v. *Commercial Bank of New Brunswick* (5), in this Court in *British Mutual Banking Co.* v. *Charnwood Forest Railway* (6), and by Lord Selborne in the House of Lords in *Houldsworth* v. *City of Glasgow Bank* (7), and by Lord Davey in *Ruben* v. *Great Fingall Consolidated* (8), and must in my opinion be regarded as an integral part of the law of agency. Lord Selborne says (9), "It is a principle not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual." The qualification of the principal's liability is confined to cases where the agent acts for or with a view to his own benefit to the exclusion of that of his principal, and the words "for the master's benefit" extend to cases where the servant acts with a view to such benefit whether benefit actually results or not, and although the servant has been expressly forbidden to do the act from which the injury has arisen.

(1) L. R. 2 Ex. at p. 265.
(2) (1697) 1 Ld. Raym. 264.
(3) (1835) 2 C. M. & R. 432.
(4) 1 H. & C. 526.
(5) L. R. 5 P. C. 394.
(6) 18 Q. B. D. 714.
(7) (1880) 5 App. Cas. 317, at p. 326.
(8) [1906] A. C. 439, at p. 446.
(9) 5 App. Cas. at p. 326.

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So far as regards partners, their rights and liabilities as agents each for the other for each other's torts now rest on ss. 10 and 11 of the Partnership Act, 1890, and it is not necessary now to consider whether that Act has effected any or what alteration; the law as laid down by Willes J. applies to all other cases of principal and agent. But the application of this law to any given case may be prevented by the rules of evidence; estoppel is a rule of evidence, not a cause of action, and may operate to prevent a litigant from setting up and proving facts on which he wishes to rely; and the explanation of the numerous and perplexing authorities cited to us rests, in my opinion, on the applicability of this doctrine of estoppel, and not on any qualification of the generality of the rule of law.

The plaintiff in an action against A. for damages for injury caused to him by the tortious act of B., A.'s agent, has to prove that such act was within the scope of B.'s agency; if it is, then such act was by legal intendment done for A.'s benefit because it is presumed that A.'s intention in employing B. to perform such acts was to benefit himself. In cases of pure tort, such as, e.g., *Limpus* v. *London General Omnibus Co.* (1), cited above, where the plaintiff could not sue in tort or contract but in tort only, no question of holding out on which to found estoppel can arise; the rival omnibus run down by the defendants' omnibus in that case was exercising a legal right to drive on the highway and was not induced to do so by any representation of the omnibus company that their driver would behave with propriety; but in most of the cases the facts were not so simple, and the plaintiff could sue in tort or contract, as in the present case, and then the question of holding out became of great importance.

I will take first the plaintiff's case: he has to prove the agent's authority; if he knows, or ought to know, that such agent's authority was limited, he cannot be heard to complain as against the principal that the agent has without the plaintiff's knowledge exceeded his authority. Thus, in *Grant* v. *Norway* (2), where the master of a ship signed a bill of lading for goods which had never been shipped, and the bill was indorsed to

(1) 1 H. & C. 526. (2) 10 C. B. 665.

persons who advanced money on it, the owners of the vessel were held not liable, because "from the usage of trade, and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master; the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and, in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped": per Jervis C.J. (1) This is approved by the Privy Council in *Russo-Chinese Bank* v. *Li Yau Sam* (2), where the law is summed up thus: "If the agent be held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because, the authority being thus represented to be limited, the party prejudiced has notice, and should ascertain whether or not the act is authorized." If then the plaintiff either knew or ought to have known of the existence of any limitation on the authority of the agent whether derived from the usage of a trade or from a written document, and the act complained of is not within the authority so limited, he fails to prove his case.

Turning to the defendant, it is open to him to dispute the existence and the extent of the authority and to deny that the agent's act was done for his benefit, and any such defence, if proved, will be a complete answer, unless the doctrine of estoppel prevents him from adducing such evidence. For instance: a man deposits his title deeds or share certificates with his solicitor or banker, or conveys the legal estate to a trustee for himself without disclosing the trust on the face of the deed, and the solicitor or banker or trustee deposits (without transferring the legal estate) the deeds or certificates with his own banker to secure an advance to himself; the first depositor is not estopped from setting up his own legal or prior equitable title which will prevail against the equitable title of the ultimate depositee, because it is in accordance with the ordinary practice of mankind that he should act as he has done, and no other member of the community

(1) 10 C. B. at p. 688. (2) [1910] A. C. 174, at p. 184.

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is entitled to allege that such a course of action contains any invitation to him to do any act from which a duty to him can be inferred. But if the depositor had so deposited his deeds with his agent for the purpose of raising money thereon, he could not then be heard to dispute the extent of his agent's authority, although such agent had put the whole of the sum authorized to be raised into his own pocket, or had exceeded the amount and had embezzled the surplus: see *Brocklesby* v. *Temperance Building Society* (1); *Rimmer* v. *Webster* (2); *Russo-Chinese Bank* v. *Li Yau Sam* (3); *Montaignac* v. *Shitta*. (4) In such cases the principal must be deemed to have authorized his agent to give a valid discharge effectual for all purposes for the money so raised by reason of the impossibility of carrying on business on any other terms. If I pay cash into the credit of my account across the counter of a bank and the cashier pockets it instead of putting it into the till, the bank is liable because he is there both to accept and to give a final receipt for it. It was found impracticable many years ago to make purchasers from trustees liable to see to the application of their purchase-money, and the Legislature fifty years ago accordingly (22 & 23 Vict. c. 35 and 23 & 24 Vict. c. 145) gave them statutory powers to give receipts, and the impracticability is infinitely greater in mercantile transactions of everyday occurrence. This is in my opinion the basis of the judgment in the case of *Hambro* v. *Burnand* (5), which was so much discussed before us. In that case each of the defendants, other than Burnand, had authorized Burnand to underwrite policies and carry on the ordinary underwriters' business in his name and on his behalf. Burnand, in accordance with this authority, underwrote guarantee policies for a company in which he was interested, for his own benefit and not for that of his principals. It was held that the latter could not be heard to set up this defence; there was a clear written authority within which the underwriting came, and the principal who gave it could not throw upon persons acting bona fide and within its terms the duty of inquiry into the motives of

(1) [1895] A. C. 173.
(2) [1902] 2 Ch. 163.
(3) [1910] A. C. 174.
(4) (1890) 15 App. Cas. 357.
(5) [1904] 2 K. B. 10.

the agent; business could not be carried on upon such terms. He was put forward by the principals to do as their agent the very acts that he did, and, just as in the cases of raising money, they could not be heard to set up the dishonest motives of their agent.

It remains to consider cases in which the principal has successfully proved his defence. In *George Whitechurch* v. *Cavanagh* (1) the secretary of the company falsely and fraudulently certified that certain share certificates had been lodged with the company, and it was held that the secretary's authority was limited to giving a receipt for certificates actually lodged in the company's office, and (as I gather from the reference (2) to *Grant* v. *Norway* (3)) that such limitation of authority was matter of common knowledge: there was another estoppel suggested but disposed of on the ground that it was not estoppel at all, because it was a statement not of fact but of intention. (4) The case therefore rested merely on limit of authority, of which the depositor was deemed to have notice. *Ruben* v. *Great Fingall Consolidated* (5) is to the same effect and rests on the ground that the secretary had authority only to deliver out share certificates, and that the company had not held him out as their agent to do anything else so as to estop them from setting up the true limit of his authority. There remains the case of *British Mutual Banking Co.* v. *Charnwood Forest Railway.* (6) The secretary there was held out by the company as their agent to answer such inquiries as were in fact put to him in that case; he answered them falsely and fraudulently with a view to his own benefit and not that of his master, and the Court of Appeal held the company not liable on the authority of the law as stated in *Barwick* v. *English Joint Stock Bank.* (7) The question of estoppel was not discussed by Lord Esher, but the two Lords Justices disposed of it on the ground that the company could not give itself greater powers than it had by representation and estoppel. The reasoning of the judgments in *Barwick's Case* (7) appears to be much like

(1) [1902] A. C. 117.
(2) Ibid. at p. 125.
(3) 10 C. B. 665.
(4) [1902] A. C. at pp. 129, 130.
(5) [1906] A. C. 439.
(6) 18 Q. B. D. 714.
(7) L. R. 2 Ex. 259.

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that of Collins M.R. in *Cheshire* v. *Bailey*. (1) Lord Esher says (2), "The rule has often been expressed in the terms, that to bind the principal the agent must be acting 'for the benefit' of the principal. This, in my opinion, is equivalent to saying that he must be acting 'for' the principal, since if there is authority to do the act it does not matter if the principal is benefited by it. I know of no case where the employer has been held liable when his servant has made statements not for his employer, but in his own interest"; and Bowen L.J. says (3), "The expression that the secretary was placed in his office to do acts of 'that class' begs the very question at issue, for the defendant's proposition is, on the contrary, that an act done not for the employer's benefit, but for the servant's own private ends, is not an act of the class which the secretary either was or could possibly be authorized to do." This seems to me unanswerable, if the principal is not estopped from setting it up: on the facts in that case it was held open to the defendants to set it up because it was considered that estoppel by representation did not enlarge the company's powers, and this is no doubt correct; but it does not follow that the company cannot be held liable for the misrepresentation; the stock which was beyond their power to create could not be created by estoppel, but they could and would now be held liable for damages for the representation of their agent within the scope of his authority that such stock had been created: *Balkis Consolidated Co.* v. *Tomkinson*. (4)

The case of *Cheshire* v. *Bailey* (1) was of a different class; it was an action against a bailee without any special contract, and turned on the conduct of such bailee: Lord Collins M.R. (5) says that the bailee was not an insurer, but was only bound to use reasonable care in choosing his servants; the crime was "committed by a person who in committing it severed his connection with his master, and became a stranger." There was in that case no question of holding out or anything on which to invoke the doctrine of estoppel.

In the present case the plaintiff took the deeds of her

(1) [1905] 1 K. B. 237.
(2) 18 Q. B. D. at p. 717.
(3) 18 Q. B. D. at p. 718.
(4) [1893] A. C. 396.
(5) [1905] 1 K. B. at p. 241.

Ellesmere Port property to the defendant's office and consulted Sandles, the defendant's clerk, as to its value. Sandles was a solicitor's clerk appointed by an agreement of February 27, 1905, by the defendant to be his "conveyancing manager" and "generally as the managing clerk of the employer in the business of solicitor carried on by the latter." The agreement contained a very unusual clause, numbered 5, but as no point was made of it at the trial and the defendant was asked no questions about it, I pass it by with the observation that its meaning is obscure, but that I cannot see that it gives Sandles any authority which could assist the plaintiff; at any rate no such suggestion was made in the Court below. Sandles was a rogue, and on seeing the plaintiff appears to have at once conceived the idea of robbing her, for he asked her what other money she had, told her she got too little return for it, and volunteered advice that she should bring all her deeds next day so that he might advise what best to do; he then had conveyances both of her land and her mortgage to himself prepared, and when she came next day he procured her execution of both these documents by which the legal estate was conveyed to himself: it is clear that she knew that she was conveying to him as a step towards the sale and realization by him which he had advised, and she desired to make, of her property in order that he might invest the proceeds in shares of companies producing 20 per cent. Sandles was to guarantee her 10 per cent. and was apparently to keep the balance for himself. Sandles mortgaged the Ellesmere Port property to a mortgagee without notice who obtained the legal estate, and transferred the mortgage debt and property to a transferee who got the legal estate without notice. She now sues the defendant in detinue for her deeds, and this action, so framed, is in my opinion on the findings of the jury hopeless. Solicitors and bankers who accept the custody of their clients' and customers' deeds and securities, whether gratuitously or for reward, are not insurers, but on the contrary are liable only to use reasonable care and diligence; no solicitors or bankers would accept such bailments if they warranted safety; the case of *Cheshire* v. *Bailey* (1) cited above is conclusive on this point.

(1) [1905] 1 K. B. 237.

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Leave, however, was asked to amend by making the claim in contract as well as in tort, and the judge gave such leave, but the terms of the amendment were not written out as they ought to have been (see *Hyams* v. *Stuart King* (1)); but I will assume that they were such as to raise the question argued before us. A further amendment for negligence in performing an implied contract to sell the property and call in the mortgage money or keep the deeds, asked for after the jury had given their verdict and been discharged, was refused. I accept the findings of Scrutton J. as to the scope of Sandles' employment.

I will assume (without deciding) that, if the plaintiff had left her deeds as she did for the purpose of sale or transfer of mortgage in the usual way, the defendant would have been liable if Sandles had deposited the deeds and raised money on them for himself, on the ground that by putting Sandles into the position that he occupied the defendant held him out to the world as authorized to act for him in such a way that he could not be heard to set up the rule in *Barwick* v. *English Joint Stock Bank*. (2) But the case is entirely altered by the fact that the plaintiff intended to convey and did convey the legal estate to Sandles in order to enable him to buy speculative shares on which he was to guarantee 10 per cent. Such a transaction is not within the ordinary duties of any clerk, managing or other, in a solicitor's office, nor indeed of a partner—*Bishop* v. *Countess of Jersey* (3); *Tendring Hundred Waterworks Co.* v. *Jones* (4)—and no one can be heard to say that he or she believed it to be so: *Grant* v. *Norway*. (5) The unfounded and unreasonable belief of the plaintiff cannot enlarge the agent's authority. Not only is the purchase of shares and the guaranteeing of dividends no part of the duty of a solicitor, and still less of his clerk, but the actual loss in this case was caused by the transfer of the legal estate into the clerk's name, and this transfer it was equally no part of his duty to accept. Without this transfer the purchasers for value would have had no title, and the loss would have been the mere costs of convincing them of it and receiving the

(1) [1908] 2 K. B. 696.
(2) L. R. 2 Ex. 259.
(3) 2 Drew. 143.
(4) [1903] 2 Ch. 615.
(5) 10 C. B. 665.

deeds from them. Assuming that everything else down to that point was within the clerk's duty, no client, male or female, can assume that it is within his or her solicitor's clerk's duty to advise on anything beyond the usual business of a solicitor; the clerk can no more advise on Stock Exchange securities than he can on a horse or a motor car, nor can any client assume that he is authorized so to do, or to take a conveyance of the client's property into his own name for the purpose of realization and investing in Stock Exchange securities to be chosen by the clerk. The case is indistinguishable from the last cases cited above. In *Bishop* v. *Countess of Jersey* (1) a customer of the bank paid money into the bank; she then on the advice of one of the partners drew a cheque on her account there for 5000*l.* payable to him for the purpose of his investing it for her: he embezzled it, and the other partners were held not liable because it was no part of the partner's duty to receive personally money from the customers for investment by such partners individually; nor was there any holding out which would prevent the other partners from setting up such limitation of authority. Some suggestion was made that the plaintiff's transfer was non est factum, but the point is unarguable in my opinion on the evidence; if it was to be taken, it should have been left to the jury.

I am therefore of opinion that the judgment of Scrutton J. cannot be supported, and that this appeal should be allowed and the action dismissed with costs here and below; and I cannot find any ground on which a new trial should be ordered. The trial seems to me to have been properly conducted, although it may not be very usual to divide the finding of facts as was done; and I can find no relevancy in the letters of the defendant or of Sandles after January, none of which were referred to in this Court or put to the defendant in the Court below, and which appear to me to have no bearing on any part of the case, unless it be to discredit the defendant's account of the extent of Sandles' agency; and as all parties agree that no personal charge is intended to be made against the defendant, I am of opinion that we ought not to attempt to find in the letters or elsewhere any foundation on which such a charge might possibly be suggested. Further, on

(1) 2 Drew. 143.

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the evidence of the plaintiff herself it is in my opinion impossible that a jury could come to any conclusion in her favour, unless she could prove dishonesty in the defendant; and this is not suggested by anybody.

KENNEDY L.J. I have had an opportunity of very carefully considering the judgment which has just been delivered by my brother Farwell, and I agree with it. There is nothing which I can usefully add to the reasons given by him, with which reasons I entirely concur.

*Appeal allowed: judgment for defendant.*

Solicitor for plaintiff: *W. C. Broadbridge*
Solicitor for defendant: *G. Thatcher.*

W. J. B.

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[IN THE COURT OF APPEAL.]

## SACCHARIN CORPORATION, LIMITED *v.* CHEMISCHE FABRIK VON HEYDEN AKTIENGESELLSCHAFT.

*Practice—Foreign Corporation—Service of Writ within the Jurisdiction—Business in England—Agent's Office—"Head Officer"—Order* IX., *r.* 8.

The defendants were a foreign corporation carrying on business as manufacturers in Germany. They employed a sole agent for the United Kingdom, who rented an office in London and was paid a commission on orders obtained by him for the defendants' goods. The agent also had authority to enter into contracts for the sale of the defendants' goods without submitting the orders to the defendants. Deliveries in fulfilment of orders obtained or contracts made by him were made in some cases out of goods of the defendants lying at wharves in London and in other cases out of a stock of the defendants' goods kept at the agent's office. Goods so delivered were paid for by cheques sent by the purchasers to the agent. The agent also acted for another foreign firm:—

*Held*, that the defendants were carrying on their business at the agent's office so as to be resident at a place within the jurisdiction, and that the agent could, therefore, be properly served with a writ there, as the "head officer" of the defendants within Order IX., r. 8, in an action

brought by the plaintiffs against the defendants for breach of an agreement.

APPEAL from Lush J. at chambers.

The plaintiffs issued a writ against the defendants claiming damages for breach of an agreement. The defendants were a German company carrying on business as manufacturers of chemicals at Radebeul, near Dresden. The writ was served on one Blasius, who was the sole agent for the defendants in England. Blasius carried on the business of a chemical merchant and agent at 127, Fenchurch Street, and he occupied and paid rent for offices there under an agreement with the landlord. In addition to being agent for the defendants he had an agency for another German firm. He obtained orders in England for the defendants' goods. These orders were executed in some cases by the defendants direct from Radebeul, in other cases by Blasius drawing upon goods of the defendants lying under his control in public wharves in London and in some cases out of a small stock of goods usually kept on his premises in Fenchurch Street. He was remunerated as a mercantile agent by commission on the orders which he obtained for the defendants. On the door of his office his name appeared as "sole agent" for the defendants. In some instances Blasius entered into contracts in the defendants' name at his office for the sale of their goods without submitting the orders to the defendants for their approval. These contracts were made on printed forms on which the name of the defendants and their address in Germany appeared at the head; under the defendants' name were the words "Sole agent for the United Kingdom, E. W. Blasius. Telegrams 'Kreosot' London. Telephone 1076 Avenue." In the body of the document were the words "We have this day sold to you through our agent, Mr. E. W. Blasius," and the contracts were signed "on behalf of" the defendants by Blasius, or his clerk, as sole agent. Payments for goods were made by cheques sent to Blasius at his office, and invoices and receipts were sent by Blasius to the purchasers of the goods.

The defendants entered a conditional appearance to the writ, and then applied to set aside the writ and the service of the writ

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on the ground that they did not carry on business in England so as to be resident at a place within the jurisdiction, and that Blasius was not the "head officer" of the defendants within Order IX., r. 8.

The Master made no order on the summons. The defendants appealed, and Lush J. set aside the writ and the service of the writ.

The plaintiffs appealed.

*Atkin, K.C.*, and *Colam*, for the plaintiffs. The principle which governs cases of this kind, namely, where the question arises whether a foreign corporation can be served with a writ of summons in this country, is laid down in *Dunlop Pneumatic Tyre Co.* v. *Actiengesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.*(1) In that case Collins M.R. said that "the true test in such cases is whether the foreign corporation is conducting its own business at some fixed place within the jurisdiction, that being the only way in which a corporation can reside in this country. It can only so reside through its agent, not being a concrete entity itself; but, if it so resides by its agent, it must be considered for this purpose as itself residing within the jurisdiction." In the same case Romer L.J. formulated the principle thus: "The result of the authorities appears to me to be that, if for a substantial period of time business is carried on by a foreign corporation at a fixed place of business in this country, through some person, who there carries on the corporation's business as their representative and not merely his own independent business, then for that period the company must be considered as resident within the jurisdiction for the purpose of service of a writ." The question, therefore, is whether the defendants here were carrying on their business at some fixed place in this country by their agent, Blasius. It is submitted that they clearly were doing so. All the matters which go to the carrying on of their business are transacted in this country at the office in Fenchurch Street by their agent. Their name appears on the premises; orders are received and accepted there; goods are delivered in pursuance of such orders from

(1) [1902] 1 K. B. 342.

stock kept there, or which is under their agent's control at the docks; and payment of the price of such goods is made to their agent. The mere facts that the premises are taken in their agent's name, that he acts as agent for another foreign firm also, and that he is paid by commission instead of by a fixed salary are immaterial, because none the less by reason thereof is their business carried on in this country. [They also cited *Newby* v. *Von Oppen* (1); *La Bourgogne* (2); *Werle & Co.* v. *Colquhoun* (3); *Grainger & Son* v. *Gough*. (4)]

*Norman Craig*, K.C., and *McCardie*, for the defendants. The income tax cases, such as *Werle & Co.* v. *Colquhoun* (3), have no analogy to the present case. The Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sched. D, imposes the duty "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from . . . . any . . . . trade . . . . exercised within the United Kingdom." The question under the Income Tax Acts, therefore, is not whether the person taxed is resident within the United Kingdom, but whether the trade is exercised within that kingdom, and the Act does not say that the trade must be exercised by the person taxed. The question is whether he derives profits from such a trade. In this case it cannot properly be said that the defendants themselves carry on their business in Fenchurch Street. The premises there are in no sense the premises of the defendants. They are rented by Blasius, and if the defendants can be said to occupy them at all, they only do so as licensees, and they could therefore at any moment be turned out by Blasius; but in order to satisfy the test laid down in the *Dunlop Case* (5) the foreign corporation must have exclusive possession in its own right of some business premises in this country: see also *Grant* v. *Anderson & Co.* (6); and it must occupy those premises through its paid servant. Blasius is described as the defendants' "agent," which as used in commerce is a somewhat loose term. It clearly does not necessarily mean a servant or employee,

(1) (1872) L. R. 7 Q. B. 293.
(2) [1899] P. 1; [1899] A. C. 431.
(3) (1880) 20 Q. B. D. 753.
(4) [1896] A. C. 325.
(5) [1902] 1 K. B. 342.
(6) [1892] 1 Q. B. 108.

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but may mean any one in touch with a person or company through whom his or their goods may be procured. In the *Dunlop Case* (1) the person in charge of the stand at the Crystal Palace, at which the defendants' business was carried on, was in the defendants' employ, and the stand was in the defendants' occupation. Blasius was not the servant of the defendants. He was paid by commission. The premises were rented by him, and he carried on an agency for another foreign firm there. They were his premises where he carried on his own business. The defendants had no control over him or his clerks, or over the manner in which he carried on his business. In such cases as these, where the goods of the foreign firm are standard goods, and would no doubt be catalogued at fixed prices, it is a mere matter of form where the contracts are signed. It would be a very strong thing to say under the circumstances of this case that the defendants resided at the office in Fenchurch Street. [*Badcock* v. *Cumberland Gap Park Co.* (2), *Haggin* v. *Comptoir d'Escompte de Paris* (3), *Mackereth* v. *Glasgow and South-Western Ry. Co.* (4), and *Nutter* v. *Messageries Maritimes de France* (5) were also referred to.]

*Atkin, K.C.*, in reply. There is no authority for the proposition that the place of business of the foreign corporation in this country must be a place of which the foreign corporation has exclusive possession as tenant. If that were the law, a foreign corporation could always evade service in this country by arranging for its premises to be taken in the name of an agent.

VAUGHAN WILLIAMS L.J. I think this case is on the border line. It was pointed out in *Mackereth* v. *Glasgow and South-Western Ry. Co.* (4) that the conclusion arrived at in *Newby* v. *Von Oppen* (6), with reference to the question whether there was in England any officer of a foreign corporation who could properly be served with a writ, was one of fact; and I agree, as Fletcher Moulton L.J. has said in the course of the argument of

(1) [1902] 1 K. B. 342.
(2) [1893] 1 Ch. 362.
(3) (1889) 23 Q. B. D. 519.
(4) (1873) L. R. 8 Ex. 149.
(5) (1885) 54 L. J. (Q.B.) 527.
(6) L. R. 7 Q. B. 293.

this appeal, that the question we have to decide is really one of fact. I propose, therefore, to treat this case as one of fact, and on a question of fact I am not disposed to differ lightly from the conclusions at which my brethren have arrived. We have had cited to us a series of cases starting with *Newby* v. *Von Oppen* (1) and coming down to the *Dunlop Case* (2) in 1902. I do not assent to the proposition that there is anything in the later cases which overrules what was said in the earlier, and I see no reason to doubt that the passage from the judgment of Lord St. Leonards in *Carron Iron Co.* v. *Maclaren* (3) quoted by Blackburn J. in *Newby* v. *Von Oppen* (1) is still good law. Of course, a corporation cannot have a physical residence, and, therefore, as was pointed out by Mathew L.J. in the *Dunlop Case* (2), it has been held that for the present purpose a corporation resides in the place where it carries on its business. In *Newby* v. *Von Oppen* (4) Blackburn J. said: "In the case of *Carron Iron Co.* v. *Maclaren* (5) Lord St. Leonards, taking a different view of the facts from that taken by Lords Brougham and Cranworth, thought the Scotch corporation was resident in England. We think that there is great good sense in what Lord St. Leonards states to be the law on his view of the facts. He says: 'If the service upon the agent is right, it is because, in respect of their house of business in England, they have a domicile in England; and in respect of their manufactory in Scotland, they have a domicile there. There may be two domiciles and two jurisdictions; and in this case there are, as I conceive, two domiciles and a double sort of jurisdiction, one in Scotland and one in England; and for the purpose of carrying on their business, one is just as much the domicile of the corporation as the other.'" The fact that a corporation has no physical body rendered it necessary to make special provision for the service of the writ in the case of an action brought against a corporation, and it was accordingly provided by s. 16 of the Common Law Procedure Act, 1852, that writs may be served

(1) L. R. 7 Q. B. 293.
(2) [1902] 1 K. B. 342.
(3) (1855) 5 H. L. C. 416, at p. 459.
(4) L. R. 7 Q. B. at p. 295.
(5) 5 H. L. C. at p. 459.

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on the "head officer" of a corporation, and that enactment is in substance reproduced in Order IX., r. 8. It is not every clerk, servant, or agent of a corporation who is in such a position that he is the proper person to be served. The service must be on a person who is in the position of a head officer and who is, therefore, familiar with the business affairs of the corporation; and in my opinion the defendants' agent Blasius is such a person. I will not go through all the cases which have been referred to in the argument to shew that it is not enough that the foreign corporation should carry on business in England. It is well settled that it must also have such a definite place of business as, in the words of Lord St. Leonards, gives it a domicile in this country. It is admitted that the question we have to decide in this case is whether the defendants have a place of business in England in that sense. I will shortly state the material facts. The defendants carry on business in Germany and for the purpose of the sale of their goods in England they employ an agent here to obtain orders, and they pay him a commission. The goods which are delivered to the customers in fulfilment of orders thus obtained are in part supplied from a stock which is kept at public wharves in London, and, as to a small portion, are supplied from a stock which is kept at the agent's office in Fenchurch Street. The defendants have no servants of their own at the agent's premises. Their business there is done solely by him or by clerks employed by him. It appears also that Blasius, the agent, has power to enter into contracts of sale on behalf of the defendants without having to send to them in Germany for their sanction of each sale. Our attention has been called to the printed forms of contract in use by the agent, but I can see nothing in them inconsistent with the position of an agent doing business for commission. Blasius is a commission agent; he does not act exclusively for the defendants, but also sells goods for another principal which may compete with the defendants' goods.

The question is whether on these facts it is true to say that the defendants carried on their own business at their own place of business in London. It cannot reasonably be suggested that

they must necessarily be lessees or tenants of the place of business, though if they were, that would be a cogent piece of evidence against them. I have no doubt myself that a foreign corporation can carry on business at a place in this country within the meaning of the rule, if, although the corporation is not the lessee of the place, it is in any sense its own place of business. Two persons can carry on separate businesses in one house, or even in one room, and if one of those two businesses is the business of a foreign corporation, the fact that another business was carried on in the same place would not make it possible to say that the foreign corporation was not carrying on its business there in a place of its own. My doubt in the present case is whether there really is any occupation by the defendants of these premises as their own, and whether the occupation is not solely that of the agent. The fact that the defendants send some of their goods there to be stored is strongly relied on by the plaintiffs as evidence that the defendants occupy the premises as a place of their own where they have a right to be. I have had very great doubt whether that is sufficient evidence to establish the fact that the defendants do carry on their business at the premises in Fenchurch Street, but on the whole I am unable to say that there is no evidence which would justify a jury in coming to that conclusion, and as both my brethren are of opinion that the appeal ought to be allowed, I am not prepared to differ from them on what is purely a question of fact. I wish, however, to say emphatically that I do not think that the law on this point has been in any way altered by the later decisions. There is nothing in any of the cases, which have been cited to us, to throw any doubt on the proposition that the place in this country, where the foreign corporation carry on its business, must not only be a fixed place, but must also be the place of the foreign corporation in the sense that it has a right to be there; and evidence of that right is generally to be found in the fact that the servants of the corporation occupy that place for the purpose of its business.

FLETCHER MOULTON L.J. I am of opinion that this appeal must be allowed. I do not think it is necessary to discuss the

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question whether the ratio decidendi of the earlier and later cases is the same, because we have in the *Dunlop Case* (1) a clear enunciation by the Court of Appeal of the principles applicable to this question. As Mathew L.J. said in that case, a corporation can only reside anywhere in a figurative sense, and for the purpose of service it must be taken to reside at the place where it carries on its business; and, therefore, as Romer L.J. said in the same case (2), "if for a substantial period of time business is carried on by a foreign corporation at a fixed place of business in this country, through some person, who there carries on the corporation's business as their representative and not merely his own independent business, then for that period the company must be considered as resident within the jurisdiction for the purpose of service of a writ." The question before us therefore seems to me to be purely one of fact. We must look at all the evidence given by both parties and consider whether the plaintiffs have brought the case to such a point that it falls within the principle enunciated by Romer L.J. The question being one of fact, it is safer to decide it by looking at the things which are done rather than at the words which are used. For example, Blasius is called an agent. That may signify a variety of things. Let us see, therefore, what his position as agent of the defendants entitles him to do. He carries on business at a fixed place in London as sole agent for the defendants in the United Kingdom, though it is true that he is also agent for another firm. He has power to enter into contracts of sale for the defendants; he has their goods at his premises or at public wharves under his control, and he can and does fulfil contracts made by him for the defendants by delivery of these goods. Looking at the form of contract used by him, we find that it is headed with the defendants' name and address in Germany, and under the defendants' name is that of Blasius as their sole agent in the United Kingdom. On the contract form appear a telegraphic address and a telephone number, which purport to be those of the defendant company. In fact they both signify Blasius's office, so that it would appear that if any one desired to communicate by telegraph or telephone with the

(1) [1902] 1 K. B. 342. (2) Ibid. at p. 349.

defendants in London they would do so by wiring or speaking to Blasius's office. I think one may draw the conclusion from these facts that the defendants have adopted Blasius's place of business as their London address. Contracts made by him in this country on behalf of the defendants are signed by him, or by his clerk for him, as their agent; and so far as I can see every trade operation is done by him for the defendants at this fixed address. Taking the evidence adduced by the plaintiffs, the result is that in my opinion a very strong case is made out by them in favour of the proposition that the defendants do carry on business in England at Blasius's address by means of Blasius. On the other hand reliance is placed by the defendants on the fact that Blasius is paid by commission. Well, agents are very commonly paid in that way, and it does not seem to me that the form of his remuneration affects the question whether he is carrying on the defendants' business for them. Next it was said, and this point was urged most forcibly, that the rent of the premises in Fenchurch Street, where Blasius had his office, is paid by him, and that the place is in no sense rented by the defendants. Of course, if the defendants had rented the office and Blasius had only occupied it with their consent, that would have been a very strong piece of evidence against them; but the fact that the rent is paid by Blasius and not by the defendants is not conclusive in the defendants' favour and does not necessarily outweigh the other evidence as to all trade operations in England being carried out at those premises on behalf of the defendants. It cannot be said to be conclusively shewn that a person does not carry on business at a particular place merely because it is the fact that he is only a licensee at that place, or because the premises belong to the agent through whom the person carries on his business. I agree that it is of primary importance that a foreign corporation should carry on its business in this country at a fixed and definite place, but the fixity of the place is in no way affected by the tenure by which that fixity is arrived at. It may well be that in this particular case the defendants' right to use Blasius's office has been in some way secured in the contract between them; that has not, however, been proved, and therefore it cannot be taken into consideration by us. The

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conclusion I come to on the whole of the evidence is that the defendants do carry on their business at the office of their agent in Fenchurch Street.

The only other question is whether there was at that place a representative of the defendants who could properly be served with the writ. The *Dunlop Case* (1) relieves us of any difficulty in deciding this question, for it is clear from that decision that if a foreign corporation is carrying on its business at a place in this country the person through whom it carries on that business is the proper person to be served.

FARWELL L.J. I agree. The question is, do the defendants reside within the jurisdiction, and that is in my opinion entirely a question of fact. I think that residence is an unfortunate word to use in this connection, because a corporation cannot physically reside anywhere; and it is therefore necessary for the plaintiffs to shew that the defendants carry on their business in England and have a place of business in England where their business is carried on. It appears that the whole operation of selling the defendants' goods in this country is carried out at the offices rented by their agent in Fenchurch Street. The agent obtains the orders for the goods, enters into contracts with purchasers, and executes the contracts in some cases with goods of the defendants lying at wharves in London, and in other cases with goods which are kept in stock by the defendants at the agent's office. The bills are made out there; he sends out the invoices; and the money for the goods is paid to him there. These facts are in my opinion sufficient to prove that the defendants do carry on their business in England. Then, do they carry it on at a fixed place in England? It is said that for this purpose it is necessary they should be the owners or tenants of the place where their business is alleged to be carried on. To my mind that proposition is quite untenable. That the foreign corporation must have a fixed place of business in this country is quite clear, but the particular tenure on which it occupies that fixed place is quite immaterial. How can it be necessary to inquire whether the foreign corporation is the freeholder or leaseholder of the

(1) [1902] 1 K. B. 342.

place? The inference which I should be inclined to draw from the facts of this case is that the commission paid by the defendants to their agent probably includes a remuneration for the defendants' use of his office, and if that be so it would be correct to say that the defendants have some interest in those premises. But however that may be, I am clearly of opinion that the evidence shews that the defendants do carry on their business at the office of their agent in Fenchurch Street.

With all respect to Lord St. Leonards I think that the expression "domicile" as used by him in *Carron Iron Co.* v. *Maclaren* (1) is a little unfortunate, for he speaks of a foreign corporation having two domiciles, whereas in truth it is not possible for one person to have more than one domicile.

With regard to the question whether the agent was the proper person to be served with the writ, I think that the duties performed by him fulfil all the requirements necessary to constitute him a "head officer" of the defendants within the meaning of Order IX., r. 8.

*Appeal allowed.*

Solicitors for plaintiffs: *Munns & Longden.*
Solicitors for defendants: *Goldberg, Barrett & Newall.*

(1) 5 H. L. C. at p. 459.

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*March* 30, 31; *April* 4, 5.

[IN THE COURT OF APPEAL.]

## MACCLESFIELD CORPORATION *v.* GREAT CENTRAL RAILWAY.

*Highway—Liability to repair—Repairs voluntarily done by Local Authority—Right to Indemnity from Person under Statutory Liability to repair—Macclesfield Canal Act*, 1826 (7 *Geo.* 4, *c. xxx.*), *ss.* 19, 156.

A canal company, the predecessors in title of the defendants, acting under powers conferred upon them by a private Act of Parliament, made a canal, and in so doing cut through an old highway, which they carried by a new bridge over the canal. The roadway of the bridge having fallen out of repair and become dangerous, the plaintiffs, who were the highway authority for the district, called upon the defendants to do the necessary repairs to the roadway, and, upon their refusal to do so, did the work themselves and brought this action to recover the cost thereof from the defendants:—

*Held*, (1.) that upon the true construction of the sections of the private Act the defendants, and not the plaintiffs, were liable to repair the roadway over the bridge as well as the fabric of the bridge itself; and (2.) that the plaintiffs, being under no legal liability to repair the roadway, had acted as mere volunteers in doing the repairs, and could not recover from the defendants the cost so incurred by them.

Appeal from the judgment of a Divisional Court (Phillimore and Horridge JJ.) reversing a decision of the judge of the Macclesfield County Court.

Under the provisions of 7 Geo. 4, c. xxx. (1), a canal had been constructed by a canal company, which canal had, before the proceedings giving rise to the present action, vested in the defendants subject to the obligations imposed by that statute upon the original undertakers. In making the canal the undertakers cut through and across a public highway, and built a new bridge over the canal so constructed in order to carry the highway over it. In 1907 the plaintiffs, who were the highway authority, requested the defendants to repair the roadway on the bridge, but the defendants refused on the ground that, although they were liable to repair the fabric of the bridge, they were under no obligation, statutory or otherwise, to repair the roadway upon it. The roadway being dangerous if not repaired, the

(1) See note at end of report.

plaintiffs, as the highway authority, executed the necessary repairs at a cost of 18*s.* 5*d.*, and brought the present action to recover that amount. The county court judge gave judgment for the plaintiffs and gave leave to appeal. The Divisional Court held that the statute imposed on the defendants no liability to repair the roadway over the bridge and reversed the decision of the county court judge. The plaintiffs appealed.

*Sir Alfred Cripps, K.C.*, and *E. Sutton*, for the plaintiffs. The obligation to repair this roadway is by s. 156 of 7 Geo. 4, c. xxx., placed upon the predecessors in title of the defendants. That section applies where, as in the present case, the bridge made by the undertakers is a wholly new work, whereas s. 19, upon which the defendants rely, applies to the erection by the undertakers of a new bridge to take the place of a pre-existing one; in the latter case it might be quite right that the liability to repair the new roadway should remain in the same body that had been liable at common law to repair the old one. The law is clearly expressed by Fletcher Moulton L.J. in *Hertfordshire County Council* v. *Great Eastern Railway* (1), where he says: "Where persons, acting under statutory authority, for their own purposes interrupt a highway by some work which renders it impossible for the public to use it, an obligation is prima facie imposed upon them to construct such works as may be necessary to restore to the public the use of the highway so interrupted, and the obligation so imposed is of a continuing nature, involving not only the construction of such works, but also their maintenance. In order to rebut the presumption that such an obligation is imposed upon them, such persons must shew that the statute under the authority of which they were acting contains some provision amounting to an exemption from such an obligation." There is no provision in the Act under consideration to exempt the defendants from their prima facie obligation to repair the roadway of this bridge. In *Lancashire and Yorkshire Railway* v. *Bury Corporation* (2) it was held that under s. 46 of the Railways Clauses Consolidation Act, 1845, the roadway upon a bridge was a part of the bridge which by that section the railway company were

(1) [1909] 2 K. B. 403, at p. 412. (2) (1889) 14 App. Cas. 417.

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bound to maintain: in the present case the liability of the defendants to maintain the bridge is admitted, for s. 156 contains a positive enactment that after its erection the bridge shall be maintained by the undertakers; the liability of the defendants to maintain the roadway necessarily follows. The view of the Divisional Court that s. 156 is limited to the provision of accommodation works is untenable; it is contrary to the express language of the latter part of that section. Nor is there, as was suggested in their judgment, any conflict between s. 19 and s. 156, for those sections apply to wholly different subject-matter; s. 19 has to do only with the substitution of a new bridge for an old one.

Secondly, if the defendants are liable to repair this roadway, the plaintiffs have pursued their right remedy. Where there is an obligation on a railway company to repair a public roadway, there is a concurrent obligation upon the local authority. The plaintiffs gave express notice that they would repair the roadway if the defendants made default in doing so, and they suffered special damage by reason of the non-performance by the defendants of their statutory duty. In *Lancashire and Yorkshire Railway* v. *Bury Corporation* (1) the same procedure was followed as in the present case: it is true that this particular point was not there argued, but the right of the local authority to do the work and recover the expense from those on whom was cast the statutory obligation to repair was not questioned. A statutory duty to repair the highway in such cases has been placed on local authorities since the Public Health Act, 1875; this is a concurrent liability, and there was, in the circumstances, sufficient compulsion upon the plaintiffs to place them under a liability to do these repairs. The principle is well stated in *Louth District Council* v. *West*. (2) In somewhat similar circumstances it was held in *Holborn Union* v. *Shoreditch Vestry* (3) that, where a local authority had committed a breach of their statutory duty by neglecting to remove dust and ashes from a workhouse, the owners of the workhouse could remove the refuse themselves and recover the expense from the local authority by action. *Rex* v. *Inhabitants of St. George, Hanover Square* (4), where it was held that, there

(1) 14 App. Cas. 417.
(2) (1896) 65 L. J. (Q.B.) 535.
(3) (1876) 2 Q. B. D. 145.
(4) (1812) 3 Camp. 222.

being a special liability to repair upon the commissioners for Westminster which they had not discharged, there was nevertheless the ordinary civil liability on the parish to do the work, is exactly in point. And to the same effect is *Reg.* v. *Inhabitants of Brightside Bierlow* (1), where the proprietors of a navigation were required by a private Act to keep a road in repair and were declared liable to indictment for non-repair; but it was nevertheless held that the enactment did not relieve the township from its common law liability to repair.

*C. A. Russell, K.C.*, and *R. M. Montgomery*, for the defendants. Sect. 156 is wholly inapplicable to the facts of the present case, (*a*) on the general ground that it forms part of a fasciculus of sections dealing entirely with the provisions of accommodation works and the rights of adjacent owners, and (*b*) because its language cannot apply to the existing circumstances. The section deals with a temporary road over a temporary bridge constructed over a highway for the use of passengers during the construction of the canal; it has no relation to a permanent bridge with a permanent highway over the canal when constructed; as long as the necessity existed for such a temporary bridge the obligation to maintain and repair it would no doubt rest upon the undertakers. The section also applies to the provision of permanent accommodation works, the obligation to maintain which would be permanently in the undertakers and their successors in title. The bridge dealt with by the section is not one which is to convey the highway over the canal, but is a structure which is intended to prevent interference with the highway by the construction of the canal. The section applicable to the circumstances of the present case is s. 19. Here there was an old highway altered by the construction of the canal, and under s. 19 the substituted highway must be maintained by the same persons who were liable to repair the old one. The present case is concerned with the roadway only, and not with the bridge at all, and in respect of the roadway s. 19 throws the liability to repair on the local authority. "Bridge" and "roadway" are not interchangeable terms, and the liability to maintain them may well be placed on different

(1) (1849) 13 Q. B. 933.

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bodies. It is true that in *Lancashire and Yorkshire Railway* v. *Bury Corporation* (1) it was held that in s. 46 of the Railways Clauses Consolidation Act, 1845, the word "bridge" included the roadway over it; but that decision was limited to the interpretation of the particular section in the particular Act, and the House of Lords was careful to avoid laying down any general principle. It is admitted that, but for the special exemption contained in s. 19, the liability to repair both bridge and roadway would have been in the defendants.

Secondly, assuming the statutory liability of the defendants to repair this roadway, the local authority were not entitled to do the work except at the request of the defendants. The cases cited on behalf of the plaintiffs are not applicable. In *Louth District Council* v. *West* (2) the circumstances were wholly different; the defendant had placed an obstruction on the highway, which the plaintiffs removed in the exercise of their powers under the Local Government Act, 1894. *Holborn Union* v. *Shoreditch Vestry* (3) was the very ordinary case of special damage being caused to the plaintiffs by reason of the non-performance of their statutory duty by the defendants. Here the local authority has done the work in the course of carrying out its own obligation.

[VAUGHAN WILLIAMS L.J. What mode of compulsion could be exercised against the defendants, assuming their liability to repair?]

An indictment would lie for non-repair of the roadway. The defendants being under a statutory liability to repair the roadway, the liability of the local authority to repair it and their right to charge the defendants with the cost must depend upon a contractual relation between the parties, and there is none in the present case. Either the local authority have done nothing more than perform their own duty, in which case they cannot charge the defendants with the expense incurred in performing it, or, if the defendants are liable, there can be no liability on the part of the local authority. In *Lancashire and Yorkshire Railway* v. *Bury Corporation* (1) it seems to have been assumed

(1) 14 App. Cas. 417. (2) 65 L. J. (Q.B.) 535.
(3) 2 Q. B. D. 145.

that, if the railway company were liable to repair the roadway, there could be no liability on the part of the corporation. The cases cited in *Hertfordshire County Council* v. *Great Eastern Railway* (1), of *Rex* v. *Inhabitants of Kent* (2), *Rex* v. *Inhabitants of the Parts of Lindsey* (3), *Rex* v. *Kerrison* (4), and *Reg.* v. *Inhabitants of Isle of Ely* (5), are conclusive in favour of the defendants; in each case the provisions of a special Act were relied upon in an indictment for non-repair of a bridge, and it was held that the liability to repair was no longer in the inhabitants. It is clear that there is no concurrent liability in the local authority.

*E. Sutton* in reply. It is true that there is no provision in this statute as to the liability of the inhabitants to repair the roadway in case of the default of the company, but there is nevertheless a concurrent liability on the part of the inhabitants at large which can only be removed by the provisions of a public Act: a private Act, even if declared to be public, cannot effect the removal of such a liability, for a private Act is merely the result of an agreement. The local authority are entitled to be indemnified by the defendants for the expense of the repair to the extent to which that expense has been reasonably incurred. In substance the private Act creates a statutory duty on the part of the defendants to indemnify the local authority. [He also cited *Anon.* (6); *Rex* v. *Inhabitants of Netherthong* (7); *Reg.* v. *Oxford and Witney Turnpike Trustees* (8); *Reg.* v. *Sheffield Canal Co.* (9); *Reg.* v. *Wakefield Corporation* (10); *Rex* v. *Morse* (11); *Caledonian Railway* v. *Glasgow Corporation.* (12)]

*Cur. adv. vult.*

April 5. The following judgment was read by

VAUGHAN WILLIAMS L.J. In my judgment s. 156 of the Act 7 Geo. 4, c. xxx., for making the Macclesfield Canal does place upon the proprietors of the Macclesfield Canal, and now upon

(1) [1909] 2 K. B. 403, at p. 412.
(2) (1811) 13 East, 220.
(3) (1811) 14 East, 317.
(4) (1815) 3 M. & S. 526.
(5) (1850) 15 Q. B. 827.
(6) (1698) 1 Ld. Raym. 725.
(7) (1818) 2 B. & A. 179.
(8) (1840) 12 A. & E. 427.
(9) (1849) 13 Q. B. 913.
(10) (1888) 20 Q. B. D. 810.
(11) [1904] W. N. 114.
(12) [1909] A. C. 138, 145.

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the defendant railway company as assignees of the canal company, the obligation to support, maintain, and keep in repair the roadway over the bridge in question over the canal.

The contentions of the defendant railway company are: (1.) That s. 156 applies only to landowners' accommodation works, and not to a permanent bridge carrying a public highway, as the plaintiff corporation assert this to be. (2.) That s. 19 of this Act is inconsistent with s. 156 and is the section which determines the obligation to repair the roadway over this bridge by imposing the obligation on "the person or persons who were bound by law to repair the old bridge, road, or way before such alteration or diversion."

I agree with the county court judge that the words of s. 156 are, so far as they relate to the support, maintenance, and repair of the bridge in question and the roadway over it, general and without limitation.

I also agree with the county court judge that s. 156 deals with cases where there has been no bridge before, and that s. 19 deals with cases where the canal company take down or injure a bridge which theretofore the inhabitants of the parish or other the road authority have had to repair.

I think, however, that I ought to deal with the undoubted difficulties of construction in s. 156. Undoubtedly the first part of s. 156, and the commencement of s. 155, contain words which shew that the group of sections 155 to 158 inclusive are sections which prima facie are intended to secure that the "navigation (of the canal) may be carried on with as little damage to private property as possible," and the only remedy which is provided by this section is a remedy at the instance of adjoining landowners. It is the remedy for interference with their access to their land. The Divisional Court, as I understand, take the view that it is unnecessary that the section should provide protection for the public in case highways are interfered with, because the public rights are protected by the common law, by the liability of the road authority to be indicted if a highway is out of repair, and by the provisions of the Statutes of Bridges from 22 Hen. 8, c. 5, onwards. The Divisional Court also took the view that this construction of ss. 156—158 is confirmed and strengthened by

looking at s. 19, because it is said that that section makes it fairly clear "that when you take out the passages enabling them to cut through or injure any roadway or footway, either public or private,"—which clearly deals with highways—"and then read the last passage, 'and such road or footway so to be altered as aforesaid shall be for ever thereafter repaired and kept in repair by the person or persons who were by law bound to repair the old bridge, road, or way,' what the section does say is that this liability would thus be shifted to the people who made the alteration, but in order to avoid that we replace the liability upon the persons who previously had the liability." I am quoting from the judgment of Horridge J., but I think Phillimore J. embodies the same view in his judgment.

I cannot myself accept this view. In my opinion there is nothing in s. 19 inconsistent with s. 156. Sect. 19 deals with the case where inter alia the canal company for the purposes of their Act cut through or injure any carriage or horse road or footway, either public or private, or take down or injure any bridge or bridges, either public or private, so as to render the same impassable or inconvenient for travellers or carriages or the persons entitled to the use thereof, and provides that the company shall first make a temporary bridge or bridges of no less width than the former, and that such bridge or bridges so to be built and such roads so to be altered as aforesaid shall be for ever thereafter repaired and kept in repair by the persons who were by law bound to repair the old bridge, road, or way before such alteration or diversion, and further that the materials of the bridges so to be taken down or enlarged shall be and become the absolute property of the said company. Sect. 19, therefore, obviously deals only with the case where before the construction of the canal there was a bridge with a road or way over it repairable by the inhabitants, the parish, or some other persons, by prescription or otherwise, and it seems quite just that, where the company provides a new in the place of an old bridge, road, and way repairable by some existing body, such body and not the company should repair the new bridge substituted for the old bridge; whereas s. 156 deals with a *new* bridge put for the convenience of the company

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in a place where there has never been a bridge before, and it seems quite just that the company should support, maintain, and repair such a bridge, and I have come to the conclusion that s. 156 does throw upon the company this liability. But, whether this be so or not, it is admitted on both sides that, if there is no statutory liability, there is a common law liability thrown on those who have the duty to repair, either the inhabitants or some one who has had that duty transferred to them by statute (generally a public general statute), and on this basis I will proceed to deal with the question of the right of the corporation who have done the necessary repairs to sue the defendant company for the expenses which they have incurred in so doing as money paid at the request of the defendants. It is argued on behalf of the defendants that, if s. 156 imposes on the company the obligation to support, maintain, and repair this bridge and the road over it, this in itself relieves the antecedent road authority from liability. I confess I have always thought that this transfer of liability could only result from a provision in a public general Act, but Mr. Russell quoted *Rex* v. *Kerrison* (1) as shewing that the liability might be at all events temporarily transferred by a special Act as distinguished from a public general Act, which seems to shew that the same result may be brought about by a special Act.

I do not think I need give any decision on this point, because I agree entirely with the Divisional Court that, whether the liability to repair is or is not imposed on the corporation as representing the parish, there would be no right in the corporation having done the repairs to recover from the company, because there is nothing in the Act to shew whether the liability is primary or secondary, and of course no such action for money paid would lie if the effect of the special Act was entirely to relieve the corporation as representing the parish from liability. Moreover this action is not brought on the basis of concurrent liability. The result is that this appeal is dismissed.

FARWELL L.J. I am of the same opinion. On the question of the construction of the statute I do not feel much difficulty.

(1) 3 M. & S. 526.

Sect. 156 applies in terms to that which has happened in the present case. It is impossible to adopt the construction suggested by Mr. Russell that the latter part of that section is only for the benefit of adjacent landowners and not of the general public. If that were so, it would be possible for the landowners by contract with the company to deprive the public of any rights in the common highway mentioned in that part of the section. The latter part of the section forbids the company to make any trench or watercourse or any part of the canal across any common highway until they have made and provided a good and sufficient temporary road, bridleway, or footpath for the accommodation of all persons whomsoever "and until a good and sufficient bridge or bridges, passage or passages, over, across, or under the said highway, bridleway, or footpath, shall be made and perfected; and all such gates, stiles, bridges, arches, and other works and conveniences so to be made as aforesaid shall from time to time thereafter be supported and maintained and kept in sufficient repair by the said company." It is clear therefore that, before the company are entitled to cut a single piece out of the highway, they must first make an accommodation road to enable the traffic to go round while they are blocking the highway, and also must make a bridge over that part of the highway which they are about to cut for the purposes of their canal. It is clear that that has to be done by the company, and that the bridge when made must be kept in repair by them. I see nothing inconsistent with that in s. 19, which deals with three cases, the diversion of a stream, the cutting through or injuring a carriage road, horse road, or footway, and the taking down or injury of bridges. Where a new thing like a bridge is substituted for the former highway a new liability is created, and s. 156 imposes such new liability on the undertakers for whose benefit the bridge was substituted for the road; but where there is nothing but replacement and the status quo ante is in effect restored, then the old liability remains in the persons who bore it before. On the question of liability it is not immaterial to notice that s. 19 expressly provides that "such bridge or bridges so to be built or otherwise enlarged, and such road or footway so to be altered as aforesaid shall be

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for ever thereafter repaired and kept in repair by the person or persons who were by law bound to repair the old bridge, road, or way before such alteration or diversion." We have, therefore, here an enactment which requires the local authority, if and so far as the bridges have been removed and restored, to take up the liability which they have before had to bear, in respect of the new bridge which has been made in lieu of the old one. It was argued before us that the word "bridge" included the roadway over it, and that therefore the local authority would have to keep in repair the road as well as the structure of the bridge. But in this particular section the word "bridge" is contrasted with "road," and it cannot in my opinion override the clear and specific language of s. 156. Before commencing any work under s. 19, there is a preliminary liability on the company before they cut their canal through the highway. On the construction of the Act, therefore, I think that the liability is on the undertakers, and inasmuch as the two sections are contrasted, the one expressly stating that the undertakers are to bear the liability, and the other expressly stating that the persons who were before bound by law to repair the old bridge are to continue so liable, the liability of the undertakers must be a primary liability, and on the authorities to which I am about to refer it is a liability which (at any rate so long as the undertakers are in a position to discharge it) replaces the common law liability of the local authority.

The cases referred to by Mr. Russell are *Rex* v. *Inhabitants of Lindsey* (1), *Rex* v. *Inhabitants of Kent* (2), and *Rex* v. *Kerrison*. (3) In *Rex* v. *Inhabitants of Lindsey* (1) Grose J. says: "The defendants cannot be liable to repair a bridge erected and continued for the private benefit of the company; for without the cut made by the company for their own benefit, there would be no necessity for the bridge." Then in *Rex* v. *Kerrison* (3) Lord Ellenborough says (4): "What has been done is not a mere incommoding the passage, leaving the public a partial enjoyment of the highway, but it is a total deprivation of the means of using it." *Rex* v. *Kerrison* (3) is exactly the present case, for

(1) 14 East, 317.
(2) 13 East, 220.
(3) 3 M. & S. 526.
(4) Ibid. at p. 531.

it was the case of a canal company and a bridge made over the canal instead of the old highway, because the canal cut through it. In that case Bayley J. says: "What benefit does this county derive from passing over a bridge instead of the solid highway?" Those authorities are exactly in point, and after all these years it is quite impossible to attempt to depart from them. That leaves the local authority in the position that, inasmuch as they are under no liability to repair, they have no right to do repairs and call upon the defendants to indemnify them for the costs to which they have voluntarily put themselves. Mr. Russell also referred to *Reg.* v. *Brightside Bierlow* (1), and Sir Alfred Cripps placed great reliance upon that case. But there was an express provision in the private Act of Parliament in that case that "nothing in this Act contained shall excuse the inhabitants . . . . from contributing to the repair thereof . . . . as they are now obliged to do by law." Assuming that that decision had any application to the present case, which in my opinion it has not, it leaves Sir Alfred Cripps in the difficulty that, in a case where the liability was held to be a common one, Coleridge J. said (2): "Although the probable intention was that each party should contribute to the repair, and no provision is made for adjusting the proportion of each, that difficulty of apportioning the burden does not create an exemption for either. We are therefore of opinion that the indictment lies."

The result is that, although I do not agree with the Divisional Court in the construction which they put upon the Act, I nevertheless agree in the decision at which they arrived, for I think that the plaintiffs have done the repairs without being under any legal liability to do them, and that they have no right to recover the amount from the defendants. The appeal therefore fails.

KENNEDY L.J. I have come to the same conclusion, both on the reasoning on which this case must be decided and on the authorities which have been so fully dealt with by my learned brethren; I need add but a few words in expressing my concurrence.

(1) 13 Q. B. 933. (2) Ibid. at p. 943.

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Kennedy L.J.

Upon the question of construction, I think that the true view is that contended for by the plaintiffs. It is sufficient to say that s. 19 deals with the replacement of old by new, in which case the liability is to remain, so far as the repairs are concerned, upon those who, in the case of the old bridge, were bound to repair and that s. 156 is a section which obliges the undertakers, in certain cases named in the latter portion of the section, to create a new work. They are empowered to create that new work for the purpose of their undertaking, in the present case a canal; and it seems to me that, if there were a difficulty of construction, one ought to favour the view which casts upon those who for their own convenience and for the purposes of their undertaking create a new structure which is not in any way in substitution for an old one, and which will require maintenance, the burden of maintaining it, and that the cost should not fall upon those who before had the maintenance of highways passing through the county.

In the case of *Lancashire and Yorkshire Railway* v. *Bury Corporation* (1) a case was stated by agreement between a local authority and a railway company, in which it was apparently assumed by the parties who agreed to state the case that, if there was a legal liability on the railway company to repair, yet, if the local authority had incurred expense in the repair of the roadway over the bridge in question, they could recover those sums from the railway company. But that is no authority in the present case, either upon the point of construction or upon the point of liability; because the way in which the case was stated did not raise these points as they are raised in the present case. Assuming the question of construction to be decided in favour of the plaintiffs, the difficulty which I, in common with the other members of the Court, feel to be insuperable is the difficulty of finding legal grounds upon which, having done work which they were not bound to do, the local authority can recover. If it could have been shewn that the plaintiffs were legally compellable to do the work, I should say that, having been compelled to do something which the railway company ought to have done, the plaintiffs might recover; but

(1) 14 App. Cas. 417.

the authorities, as Farwell L.J. has pointed out, are clear to shew that it would be a sufficient defence in a case of this kind, were proceedings taken against the local authority for non-repair of the roadway passing over the bridge, to shew that Parliament by this private Act in a section which, so far as regards the portion with which we are concerned, has to be construed for the public benefit, not for the benefit merely of an individual or a set of private individuals, has ordered that the repair is to be done by the company. In such a case it could have been pleaded as a defence to proceedings against the local authority that the burden had been thrown upon another body, and therefore the common law liability had been, as it were, extinguished by the will of Parliament. Not being under a statutory obligation to pay for or to do the work, this local authority has done the work and incurred expense in doing it, and I do not know the legal principle upon which in those circumstances they can throw the burden upon some one else who ought in the first instance to have done the work, and who therefore is in a position to say "You who seek to recover this payment from me have acted as volunteers." In those circumstances it appears to me that on one of the grounds taken by the Divisional Court, whilst I should not assent to the main reason upon which the judgment proceeded, their decision was sound, and therefore we must dismiss this appeal.

*Appeal dismissed.*

Solicitors for plaintiffs: *Sharpe, Pritchard & Co., for F. R. Oldfield, Macclesfield.*

Solicitor for defendants: *D. H. Davies.*

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NOTE.—The following are the sections of the special Act (7 Geo. 4, c. xxx.) which were referred to in argument:—

Sect. 19: "In all cases where it shall be found necessary for the purposes of this Act to divert or turn any brook, stream, or watercourse, or to cut through or injure any carriage or horse road or footway, either public or private, or to take down or injure any bridge or bridges, either public or private, so as to render the same impassable or inconvenient for travellers or carriages, or the persons entitled to the use thereof, or to divert or turn any such road or way, the said company of proprietors shall at their own expense first make a cut or channel for such brook, stream, or watercourse,

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or a temporary bridge or bridges, of no less width than the former; and when such cut or channel shall be completed and finished the part of the bed or channel of the brook, stream, or watercourse so to be taken, used, diverted, and turned shall be and become vested in fee simple in the said company of proprietors, with full power for them to sell or dispose of the same in such manner and form and under such regulations as are hereinafter directed with respect to lands which shall be purchased by the said company, and found unnecessary to be made use of for the purposes of the said navigation, or as near thereto as the case will admit; and such bridge or bridges so to be built or otherwise enlarged, and such road or footway so to be altered as aforesaid, shall be for ever thereafter repaired and kept in repair by the person or persons who were by law bound to repair the old bridge, road, or way before such alteration or diversion; and further, that the materials of the bridges so to be taken down or enlarged shall be and become the absolute property of the said company of proprietors."

Sect. 156: "The said company shall, at their own costs, divide and separate, and keep constantly divided and separated, the said canal, towing paths, trenches, or passages, or such part or parts thereof respectively as shall be declared necessary by any two or more justices of the peace of the county in which the same shall be, from the adjoining lands or grounds, by posts, rails, hedges, ditches, trenches, banks, or other fences sufficient to keep off sheep and other cattle, as well as for the due protection of gardens and garden grounds to be set out and made on the lands or grounds which shall be purchased by, conveyed to, or vested in the said company as aforesaid; and the said company shall, at their proper costs and charges, from time to time maintain and support the said towing paths, and the said posts, rails, hedges, ditches, trenches, banks, and other fences to be set up and made as aforesaid, and also shall, at their like costs and charges, make, erect, and set up, and from time to time maintain and support, such and so many convenient bridges across the said canal, or any aqueduct, conductor, or watercourse leading into the same, with proper approaches to such bridges respectively, and also gates and stiles in and through all the hedges and fences to be by them so made on the side of such towing paths as aforesaid, in such manner as any two or more justices of the peace of the county in which the same shall be situate shall from time to time judge necessary and appoint, for the use of the owners and occupiers of the lands and grounds or hereditaments adjoining to such canal; and the said company shall not make the said canal or any part thereof, or any trench or watercourse belonging to the same, in or across any common highway, public bridleway, or footpath, until they shall, at their own costs and charges, have made and provided a good and sufficient temporary road, bridleway, or footpath for the accommodation of all persons whomsoever, and until a good and sufficient bridge or bridges, passage or passages, over, across, or under the said highway, bridleway, or footpath, shall be made and perfected; and all such gates, stiles, bridges, arches, and other works and conveniences so to be made as aforesaid shall from time to time thereafter be supported and maintained and kept in sufficient repair by the said company."

W. J. B.

[IN THE COURT OF APPEAL.]

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*April* 1, 3; *May* 19.

## MAASS *v.* GAS LIGHT AND COKE COMPANY.

*Practice — Discovery — Interrogatories — Malicious Prosecution — Information upon which Defendants commenced Prosecution — Steps taken by Defendants.*

In an action for malicious prosecution (the plaintiff having been committed for trial and acquitted upon a charge of stealing gas brought against him by the defendants) the plaintiff sought to administer the following interrogatories (among others) to the defendants:—"4. What information (if any) had you that induced you to prosecute the plaintiff for stealing gas? What steps (if any) had you taken before commencing the said prosecution to ascertain whether the charge was true or not? What grounds (if any) had you for supposing that the plaintiff had committed the offence charged? Did you before you commenced the said prosecution take any and what precautions or make any and what inquiries as to the truth of the said charge, and what was the result of each such inquiry? 5. What are the facts and circumstances on which you rely as shewing that you had reasonable and proper cause for the said prosecution?" Both interrogatories were disallowed by the Master and judge in chambers:—

*Held* (by the Full Court of Appeal), that the fifth interrogatory ought not to be allowed.

*Held* (by Cozens-Hardy M.R., Vaughan Williams L.J., Fletcher Moulton L.J., Farwell L.J., and Buckley L.J., Kennedy L.J. dissenting), that, in the absence of special circumstances, such an interrogatory as the fourth interrogatory ought not to be allowed in an action for malicious prosecution, in which class of action there were special reasons for caution in allowing interrogatories to be administered to a defendant.

Appeal of the plaintiff from an order of Ridley J. at chambers disallowing certain interrogatories in an action for malicious prosecution.

The plaintiff was arrested at the instance of the defendants upon a charge of stealing gas and was committed for trial; at the trial he was acquitted. He then brought the present action to recover damages for malicious prosecution. In their defence the defendants admitted the fact of the prosecution of the plaintiff, but denied that they had acted maliciously or without reasonable and probable cause. The plaintiff sought to administer two interrogatories (with others), which are set out in the head-note to this report.

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Both these interrogatories were disallowed by Master Chitty, whose decision was affirmed by Ridley J. The present appeal, after being opened, was directed to be heard before the Full Court of Appeal.

*Sir F. Low, K.C.*, and *Morle*, for the plaintiff. (1) The interrogatories are unobjectionable and should have been allowed. Until they are answered, it is impossible to say whether a complete answer would necessitate the disclosure of the names of the defendants' witnesses, and an objection on that ground is therefore not a good one at the present stage. They are relevant to an overriding issue in the case, whether the defendants were actuated by malice in instituting the prosecution. The plaintiff has the burden of proving affirmatively the existence of malice and negatively the absence of reasonable and probable cause, and he is entitled to get by interrogatories any information which may help him to discharge that onus. The case is governed by *Elliott* v. *Garrett* (2), where, in an action of slander, in which malice was denied in the defence, an interrogatory asking what information the defendant had which induced him to believe that the words spoken by him were true, and what steps he had taken before speaking them to ascertain whether they were true, was allowed as being relevant to the issue of malice raised in the pleadings and directed to support the plaintiff's case. It is true that in *Hennessy* v. *Wright* (3) and *Parnell* v. *Walter* (4) it was held that the information sought was not relevant to the issue, but those decisions, as well as *Plymouth Mutual Industrial Society* v. *Traders Publishing Association* (5), depended chiefly on the fact that they were cases of libel in newspapers; to such actions different considerations apply: *Hope* v. *Brash*. (6) In the present case the plaintiff is entitled to discovery in order to prove the state of mind of the defendants, the onus of proving which is on the plaintiff; he has affirmatively

(1) In the course of the argument counsel for the plaintiff admitted that he relied chiefly on the fourth interrogatory, and the appeal as regarded the fifth interrogatory was not pressed.

(2) [1902] 1 K. B. 870.
(3) (1888) 24 Q. B. D. 445.
(4) (1890) 24 Q. B. D. 441.
(5) [1906] 1 K. B. 403.
(6) [1897] 2 Q. B. 188.

to prove malice, and, that being so, it is immaterial that the answer might or would disclose the names of the defendants' witnesses. This is the first case in which it has been sought to apply the logical result of the decisions in cases of newspaper libel to other cases of tort. It is admitted that discovery is not ex debito justitiæ, but is discretionary; the discretion must, however, be judicially exercised. The principle on which it should be exercised is well laid down by Collins M.R. in *White* v. *Credit Reform Association*. (1)

[VAUGHAN WILLIAMS L.J. There is no reason for supposing that the refusal of discovery in actions for libel in newspapers went upon any principle not generally applicable; those cases are only well-marked instances of the principle of refusing discovery because of the oppression it would involve.]

No oppression would be involved in ordering an answer to the fourth interrogatory. Looking at the onus of proof which is on the plaintiff, the interrogatory ought not to be considered as an attempt to find out the defendants' case, but rather to prove the plaintiff's own. The state of mind of the defendants being the question for decision, the view expressed by Collins M.R. in *White* v. *Credit Reform Association* (2) is applicable to a case of malicious prosecution. In *Whatelcy* v. *Crowter* (3) and *Carew* v. *Davies* (4) very similar interrogatories were allowed. If interrogatories may be reasonably expected to advance the plaintiff's case, it is no objection that they will at the same time disclose the defendants' case. [They also cited *Marriott* v. *Chamberlain*. (5)]

*Herbert Rowsell*, for the defendants. Both the judge and Master have exercised their discretion against the allowance of this interrogatory, and there is no ground for suggesting that that discretion has not been judicially exercised. The interrogatory is fishing, and is asked with a view of enabling the plaintiff to find out whether he has a case against the defendants; it comes within the mischief dealt with by Lord Esher M.R. in *Hennessy* v. *Wright* (6), where he says: "In other words, the

(1) [1905] 1 K. B. 653.
(2) Ibid. at p. 658.
(3) (1855) 5 E. & B. 709.
(4) Ibid.
(5) (1886) 17 Q. B. D. 154.
(6) 24 Q. B. D. 445, at p. 448.

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plaintiff wishes to maintain his questions, and to insist upon answers to them, in order that he may find out something of which he knows nothing now, which might enable him to make a case of which he has no knowledge at present. If that is the effect of the interrogatories, it seems to me that they come within the description of 'fishing' interrogatories, and on that ground cannot be allowed." The fourth and fifth interrogatories are so wide that the plaintiff might just as well ask for discovery of the contents of the defendants' brief. The fifth interrogatory, which is not pressed, is only an amplification of the fourth, and the latter is framed in the very teeth of the principle laid down by Buckley L.J. in *Hooton* v. *Dalby* (1) in the following terms: "Shortly put, the interrogatory seems to me inadmissible, because it asks the defendant on what line of facts he is going to rely in support of his case." Judged by this test the fourth, as well as the fifth, interrogatory is quite indefensible; it has all the vices of the interrogatory in *Lever Brothers* v. *Associated Newspapers Co.* (2), which was disallowed on the ground that it was an inquiry as to whether the defendants intended to rely on a particular defence at the trial. In an action in which the defendant was charged with fraud the plaintiff could not possibly be allowed to interrogate the defendant as to how he intended to prove his honesty, and that is precisely analogous to what the plaintiff is seeking to do here. *Ridgway* v. *Smith & Son* (3) and *Caryll* v. *Daily Mail Publishing Co.* (4) also shew that a plaintiff cannot interrogate in order to find out the way in which a defendant intends to make out his case. Further, it does not follow that all matters which might be the subject for cross-examination at the trial are proper matters for interrogatories: per Romer L.J. in *Caryll* v. *Daily Mail Publishing Co.* (4) [He also cited *Arnold & Butler* v. *Bottomley* (5); *Kennedy* v. *Dodson.* (6)]

*Sir F. Low, K.C.*, in reply, referred to *Abrath* v. *North Eastern Railway.* (7)

*Cur. adv. vult.*

(1) [1907] 2 K. B. 18, at p. 21.
(2) [1907] 2 K. B. 626.
(3) (1890) 6 Times L. R. 275.
(4) (1904) 90 L. T. 307.
(5) [1908] 2 K. B. 151.
(6) [1895] 1 Ch. 334.
(7) (1886) 11 App. Cas. 247.

May 19. COZENS-HARDY M.R. (1) This is an action for malicious prosecution. The statement of claim alleges that the defendants falsely and maliciously and without reasonable or probable cause prosecuted the plaintiff on a charge of stealing gas. The plaintiff sought to administer five interrogatories, the first three of which were allowed by the Master, and no question arises upon them. But Master Chitty refused to allow Nos. 4 and 5, and his decision was affirmed by Ridley J. The notice of appeal seeks to reverse Ridley J.'s order. The interrogatories in question are as follows: "4. What information (if any) had you that induced you to prosecute the plaintiff for stealing gas? What steps (if any) had you taken before commencing the said prosecution to ascertain whether the charge was true or not? What grounds (if any) had you for supposing that the plaintiff had committed the offence charged? Did you before you commenced the said prosecution take any and what precautions or make any and what inquiries as to the truth of the said charge, and what was the result of each such inquiry? 5. What are the facts and circumstances on which you rely as shewing that you had reasonable and proper cause for the said prosecution?"

Now as to No. 5 I am clearly of opinion that it ought not to be allowed, and counsel for the appellant did not seriously dispute this.

As to No. 4 there is more difficulty. It is plain that the Court has in all actions a discretion to allow or not to allow an interrogatory. This discretion is in the first instance vested in the Master, subject to appeal to the judge, whose exercise of this discretion ought not to be lightly interfered with. In exercising this discretion it is legitimate to have regard, amongst other things, to the nature of the action, and the probable consequences which will result from allowing the interrogatory. In an action for malicious prosecution, which is the case before us, there are special reasons for caution in allowing the interrogatory. The sense of duty which impels a citizen in a case where there is reason to suppose that a crime has been committed is often a duty which he owes to the State and also to those who are

(1) This judgment was read by Fletcher Moulton L.J.

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under his control or in his service. If in every case in which a prosecution fails the prosecutor is to be compelled in an action to give the names of all the persons from whom he received information, often reluctantly given, and the substance of that information, it would become very difficult to get people to give information which, in case of acquittal, might result in an action against the informant for defamation under circumstances not admitting of a defence based on privileged occasion. As a general rule and in the absence of special circumstances, the judge, whose duty it is to exercise his discretion, will probably consider that such an interrogatory as No. 4 ought not to be allowed in an action for malicious prosecution. There is no ground for supposing that the discretion exercised by Master Chitty and Ridley J. was not wisely exercised. It is perhaps right to add that the interrogatory could not be usefully, or indeed fairly, answered without in effect disclosing names. "What information," "what steps," "what grounds," "what precautions," "what inquiries," necessarily involve the source of the information, and the appellant's counsel admitted that this was the object of the interrogatory.

The appeal must be dismissed with costs.

VAUGHAN WILLIAMS L.J. read the following judgment:—I agree entirely in the judgment just delivered by the Master of the Rolls. The point decided in it is sufficient to dispose of the case before us, and further lays down something like a general rule to guide the discretion of the judge in chambers on an application to allow interrogatories made by a plaintiff in an action for malicious prosecution. The rule adopted generally by judges of old, not to decide anything more than was necessary to decide the case before the Court, was a wise and astute rule, and is acted on occasionally even in the final Court of Appeal. I think, however, that cases raising questions as to practice at judges' chambers stand on a rather different footing, and personally I should have been glad if the judgment we have just heard had in express terms recognized such a rule as to the finality of judicial discretion exercised by a judge in chambers allowing or disallowing interrogatories as would have neutralized

the conflict at present appearing between the cases on this question of allowing interrogatories. The able argument of Sir Frederick Low brought this conflict of authorities fully before us. The large number of appeals from the judge in chambers on these questions as to interrogatories makes it very desirable to get rid if possible of this undesirable addition to the cost of litigation. I hope that either by decision of some future case or by some new rules of Court this fruitful source of litigation may be determined.

FLETCHER MOULTON L.J. I entirely agree with the judgment of the Master of the Rolls.

FARWELL L.J. I agree.

BUCKLEY L.J. I agree with the judgment of the Master of the Rolls, and my mind goes entirely with the observations that Vaughan Williams L.J. has added to it.

KENNEDY L.J. read the following judgment:—I am sorry that I find myself unable to concur in the judgment which has just been delivered. It appears to me to tend towards an undue restriction of the plaintiff's right to discovery in an action of this kind. I had prepared a written judgment setting forth very carefully and very fully the grounds, of principle and of authority, for my dissentient opinion in regard to the fourth interrogatory. But the question before us is after all one of judicial discretion and of practice; and it appears to me to be both more agreeable to my sense of the respect due to the unanimous opinion of my colleagues and more conducive to the business and to the authority of this Court if I refrain from doing more than expressing, with regret, my inability to concur in the judgment which has been pronounced by the Master of the Rolls, and which is the judgment of this Court.

*Appeal dismissed.*

Solicitor for plaintiff: *John Spurling.*
Solicitors for defendants: *C. O. Humphreys & Sons.*

W. J. B.

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*May* 26, 29.

[IN THE COURT OF APPEAL.]

## *In re* T. COOPER.

*Bankruptcy—Bankruptcy Notice—Validity — Claim for Judgment Debt and Interest—Income Tax—Deduction—"Yearly Interest."*

A bankruptcy notice required payment of a certain sum claimed as being the amount due on a final judgment. In the margin of the notice particulars of the amount claimed were given, namely, debt so much, interest at 4 per cent. to date so much. Objection was taken that this notice was bad as it claimed interest in full without allowing for income tax which could or ought to have been deducted by the debtor:—

*Held*, that a judgment debt, though by law carrying interest from the date of the judgment, was not a transaction to which the language of the Income Tax Acts relating to "yearly interest of money" applied, and that the notice was valid and the receiving order based upon it rightly made.

*Held*, also (per Buckley L.J.), that what the bankruptcy notice has to require is that the debtor shall pay the judgment debt in accordance with the terms of the judgment: to pay in accordance with the terms of the judgment is to pay the amount for which judgment has been recovered with the legal interest attached to it by the statute: assuming that payment by the debtor of the debt less the income tax would be payment, yet that a notice requiring him to pay the whole sum was none the less right; and that the notice was valid on this ground also.

Appeal against a receiving order made by one of the registrars in bankruptcy.

The only question argued which calls for any notice in this report was a technical objection as to the validity of the bankruptcy notice. The facts on this point were as follows:—

On December 20, 1910, the petitioning creditors, the Manchester and Liverpool District Banking Company, Limited, obtained judgment against the debtor for 3750*l.* 5*s.* 8*d.*

On December 28, 1910, a bankruptcy notice in the usual form was served on the debtor requiring him to pay 3753*l.* 11*s.* 4*d.* claimed by the bank "as being the amount due on a final judgment obtained by them against you in the King's Bench Division

of the High Court dated 20th day of December, 1910." In the margin the particulars of the amount were given :

| | | | |
|---|---|---|---|
| " Judgment debt . . . . | £3750 | 5 | 8 |
| Interest at 4 per cent. to date . | 3 | 5 | 8 |
| | £3753 | 11 | 4" |

Default having been made in complying with this notice, the registrar made a receiving order. The debtor appealed. The appeal was heard May 26 and 29.

*Clayton*, K.C., and *A. Cairns*, for the appellant. No allowance has been made for the income tax, 3*s.* 9*d.*, which the debtor could or ought to have deducted from the amount claimed.

The judgment debt carries interest, and this interest is "yearly interest of money" within the meaning of the Income Tax Acts which the debtor has the right to deduct: Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 102. The deductions of the yearly interest must be allowed by s. 103.

It has also been decided in *Bebb* v. *Bunny* (1) that the words "yearly interest" in s. 40 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), include not only interest accruing de anno in annum, but any interest at a fixed rate per cent. per annum though accruing de die in diem.

The application of the Income Tax Act of 1853 is continued on this point by the Customs and Inland Revenue Act, 1888. *Goslings & Sharpe* v. *Blake* (2) recognizes the law on this point as laid down by *Bebb* v. *Bunny* (1), which was followed by Warrington J. in *In re Craven's Mortgage* (3), where *Goslings & Sharpe* v. *Blake* (2) is again distinguished on this point. [They also cited *London County Council* v. *Attorney-General.* (4)]

The interest running on the judgment debt being "yearly interest" within the meaning of the Income Tax Acts, the bankruptcy notice is bad because it claims this sum of 3*s.* 9*d.* in excess of what is actually due from the debtor: *In re a Debtor.* (5)

*Rowlatt*, for the respondents, the petitioning creditors. The

(1) (1854) 1 K. & J. 216.
(2) (1889) 23 Q. B. D. 324.
(3) [1907] 2 Ch. 448.
(4) [1901] A. C. 26.
(5) [1908] 2 K. B. 684.

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interest which accrues on a judgment debt by virtue of the statute is not in the nature of the "yearly interest" referred to in the Income Tax Acts. Income tax does not affect the amount of the judgment debt. The bankruptcy notice only requires the debtor to pay the amount for which judgment has been recovered with the legal interest attached to it by virtue of the statute. Interest for less than a year, or for short loans, is always payable in full and the income tax is accounted for in the next year's profits: the point is covered by *Goslings & Sharpe* v. *Blake* (1), and in the present case this 3*s.* 9*d.* could not properly have been deducted at the time. Had the debtor tendered the full amount of the judgment debt and interest less this 3*s.* 9*d.* in due time the case might have been different, but nothing of this kind was done, and even then the bankruptcy notice would have been valid, as demanding payment of the debt in accordance with the judgment.

*A. Cairns* replied.

COZENS-HARDY M.R., after stating the nature of the appeal, continued:—The objection now raised to the validity of the bankruptcy notice is a purely technical one, but as that notice, the foundation of the bankruptcy, is of a peculiar nature, and is of an extremely technical character, it is necessary to consider with some care whether there is or is not even on the most technical grounds any foundation for this objection.

The debt in question is a judgment debt obtained by the petitioning creditors on December 20. That was a judgment for 3750*l.* 5*s.* 8*d.*—that is to say, the debt and costs. That is a judgment debt which by law carries interest at 4 per cent. having regard to the Judgment Act, 1 & 2 Vict. c. 110. The bankruptcy notice, which is in the usual form, required payment to the petitioning creditors of the sum of 3753*l.* 11*s.* 4*d.* claimed by them "as being the amount due on a final judgment obtained by them against you" on a given date; in the margin is a statement shewing how that sum is made up. It is made up by 3750*l.* 5*s.* 8*d.*, the judgment debt, and 3*l.* 5*s.* 8*d.*, the interest for seven or eight days. There is no dispute that

(1) 23 Q. B. D. 324.

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the interest is properly calculated, but it is said that all these proceedings are void and invalid because income tax to the amount of 3*s.* 9*d.* has not been deducted from the sum. In my opinion this objection has no foundation.

When we get back into the maze of the Income Tax Acts it seems really to depend upon whether this sum can be properly called "yearly interest" within the meaning of the various sections to which we have been referred. In my opinion it cannot. It has been settled for very many years—laid down distinctly by Sir John Romilly in *Mosse* v. *Salt* (1), and affirmed by this Court in the case of *Goslings & Sharpe* v. *Blake* (2)—that there is some limit to those words "yearly interest." The words "yearly interest" are satisfied although the interest be not payable yearly but be payable quarterly or half-yearly, and further, as in the case of a mortgage, although the money is covenanted to be paid six months after date in the ordinary course of a mortgage, the Court treats that as being a transaction to the knowledge and the reasonable intendment of all parties, upon which yearly interest was payable in the understanding and contemplation of all parties, it being really in the nature of an investment. But it is equally established—I am reading from the words of Sir John Romilly (3)—"that in dealings between merchants, such as in discounting of bills and the like, and on loans made for short periods, the income tax is not deducted." I do not propose to read the judgments of this Court in the case of *Goslings & Sharpe* v. *Blake* (2), but they distinctly affirmed that view and held that, in the case of short loans by bankers, interest was not to be deducted by the payer, but the transaction would come into the account of profit on a different scale when the profits came to be dealt with on the previous year's accounts or in the average of the year's account.

Now in the present case I ask myself is it possible to suppose that this was a transaction in which anybody contemplated or intended anything permanent? It is quite impossible so to regard it. Is there any reason for saying that the full amount, including the 3*s.* 9*d.* in question, was not undoubtedly due from

(1) (1863) 32 Beav. 269. (2) 23 Q. B. D. 324.
(3) 32 Beav. at p. 276.

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Cooper to the bank? That again seems to me to be clear beyond argument, and I fail to see what ground there can be for saying with regard to a transaction of this kind, where in truth there was not even an agreement for a short loan,—where there was merely a judgment debt, which it is true by law carries interest for this seven days in question—that that is a transaction to which the language of the Income Tax Acts about "yearly interest" can fairly be applied. In my opinion we must answer that question in the negative. I am not personally satisfied, although I do not desire to decide this question, that, even if this interest were "yearly interest" in respect of which the judgment debtor could claim a deduction, any claim could be made unless and until he had himself paid the income tax and produced evidence to that effect: in other words, whether the time ever arrives when he can claim a deduction until he can say "Income tax is payable on this, I have paid it and I prove it to you." No such case, of course, is made here. I am not prepared to make an order which would upset numberless transactions where there has been a levy on a judgment debt with interest, the full amount of interest being levied under the judgment debt, whereas, if the argument which has been addressed to us is sound, interest less income tax ought to have been deducted when the levy was made, and the levy was excessive.

In my opinion there is nothing whatever in this technical objection. I think the receiving order is perfectly regular in form, I am satisfied there are no merits, and I think this appeal must be dismissed with the usual consequences.

BUCKLEY L.J. Not differing from anything the Master of the Rolls has said, I decide this case upon the following short ground. The petitioning creditors have obtained a judgment against the debtor. By virtue of the Act 1 & 2 Vict. c. 110 the debt carries interest at 4 per cent. The bankruptcy notice demands payment of the judgment debt and interest. The objection taken is that income tax upon the interest amounting to 3*s.* 9*d.* has not been deducted and that upon that ground the bankruptcy notice is wrong.

In my opinion that contention cannot be supported. What

the Act requires is that the bankruptcy notice shall require the debtor to pay the judgment debt in accordance with the terms of the judgment. To pay in accordance with the terms of the judgment is to pay the amount for which judgment has been recovered with the legal interest attached to it by the statute. When the debtor comes to make payment it may be that under the provisions of the Income Tax Acts he is in a position to say "I will pay you the sum less 3*s.* 9*d.*, I am going to keep 3*s.* 9*d.* and to pay it to the revenue in satisfaction of the income tax." Assuming that to be so, the bankruptcy notice is to my mind none the less complete that it requires the man to pay the whole sum. The debt is not principal, interest, and costs less income tax, but principal, interest, and costs. The bankruptcy notice is perfectly right in requiring payment of the whole sum, and none the less that it may be that the debtor could have, and for this purpose I will assume that he could have, said "I shall have paid you the whole sum if I pay you part of the sum and keep the rest to answer my obligation to the revenue." To my mind the bankruptcy notice is quite right on that ground, and this appeal should be dismissed.

KENNEDY L.J. I am of the same opinion. My own view is that this is not a deduction that could be made in respect of income tax as claimed by the appellant here. I also agree with the Master of the Rolls, as at present advised, that, even if under any circumstances there could be a deduction for income tax under the Income Tax Acts in respect of such interest upon a judgment, the time has not come nor are the circumstances in that position in which a claim to such a deduction could be set up.

*Appeal dismissed.*

Solicitors: *Farmans; Crosley & Burn.*

W. C. D.

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*May* 12, 20.

## GREGORY *v.* TORQUAY CORPORATION.

*County Court—Practice—Pleading—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61)—*Statute of Limitations—County Court Rules, Order x., rr.* 14, 18.

Where an action to which the Public Authorities Protection Act, 1893, applies is brought in the county court, and the defendants desire to rely upon the fact that the action was not commenced within the time thereby limited, it is sufficient to raise that defence by a notice in the form given in Form 85 of the County Court Forms, 1903, "That the claim . . . . is barred by a statute of limitations," without specifying the year, chapter, and section or the title of the statute.

Appeal from the Torquay County Court.

The action was brought under the Fatal Accidents Act, 1846, to recover damages for the death of the plaintiff's son, which was alleged to have been brought about by the negligence of the defendants' servants in their treatment of the deceased while in their isolation hospital, and a verdict was given for the plaintiff for 50*l.* The negligence complained of was alleged to have occurred on May 13, 1910. The plaintiff's son died on December 1, and the action was not commenced until February 25, 1911. The defendants desiring to claim the protection of the Public Authorities Protection Act, 1893, which provides that where any action is commenced against any persons for any neglect in the execution of a public duty "the action . . . . shall not lie or be instituted unless it is commenced within six months next after the . . . . neglect . . . . complained of," gave notice of a special defence according to Form 85 of the County Court Forms, "That the claim for which the defendants are summoned is barred by a statute of limitations." At the hearing the plaintiff contended that the notice was insufficient and that under the provisions of Order x., r. 18, of the County Court Rules (1) it ought to have

(1) By Order x., r. 18, of the County Court Rules, "When in any action the defendant relies on any statutory defence . . . . he shall in his statement (except in the case provided for by rule 14 of this Order) set forth the year, chapter, and section of the statute, or the short title thereof, and the particular matter on which he relies, or otherwise sufficiently indicate the nature of the defence on which he relies."

given the year, chapter, and section or the title of the statute relied on. The deputy county court judge held that the statute relied on was not a statute of limitations within the meaning of Order x., r. 14, and that the notice was insufficient. He accordingly gave judgment for the plaintiff.

The defendants appealed.

*Percival Clarke*, for the defendants. By Order x., r. 14, of the County Court Rules, "Where the defendant intends to rely on the defence of any statute of limitations, his statement shall be according to the form in the appendix." That refers to Form 85, which does not require the particular statute of limitations relied on to be specially indicated: The Public Authorities Protection Act is a statute of limitations for this purpose. The first and principal provision of that Act is a provision limiting the time within which the action may be brought. It is not necessary that the title of the statute should describe it as a statute of limitations, nor that the statute should deal with no other subject than the limitation of actions. No one would venture to deny that the Act 3 & 4 Will. 4, c. 42, was properly described as a statute of limitations, though only one out of its forty-five sections deals with that subject. Then if the notice of defence was sufficient the action was barred, for the time limited by the statute runs from the date of the accident, not from that of the death or other injury: *Carey* v. *Bermondsey* (1); *Gawley* v. *Belfast Corporation*. (2)

*Waddy*, for the plaintiff. The notice was insufficient. The Public Authorities Protection Act is not a statute of limitations within the meaning of Order x., r. 14, and Form 85. Not every Act which contains a clause limiting the time for bringing an action can properly be described as a statute of limitations. For instance a statute, such as the Workmen's Compensation Act, which confers a new right of action and at the same time limits the period within which the action may be brought clearly could not be so described. Nor in the case of a statute which limits the time for enforcing an already existing right can the mere fact of its containing such a clause of limitation justify

(1) (1903) 20 Times L. R. 2. (2) [1908] 2 I. R. 34.

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its being so described. Then if the Public Authorities Protection Act does not fall under r. 14 of Order x. the general provision of r. 18 of that Order applies, and the defendants should have indicated that they relied on the limitation of action provided by that particular statute. Prima facie a statement that the defendants will rely on *a* statute of limitations means that they will rely on a statute which is applicable to all defendants and not merely to a limited class.

[LUSH J. Do not the defendants by their notice "sufficiently indicate the nature of the defence on which they rely" to satisfy r. 18? Suppose a trustee is sued as such, would not a notice that he relied on a statute of limitations sufficiently indicate that he relied on one which was applicable to trustees? And, if so, do not the defendants, who are sued as a public authority, sufficiently indicate that they rely on a statute of limitations which is applicable to public authorities?]

*Cur. adv. vult.*

PICKFORD J. This is an appeal by the defendants from the decision of the deputy judge of the Torquay County Court in an action brought to recover damages for the death of the plaintiff's son owing to the negligence of the defendants' servants; and the point which we have to consider is whether the deputy judge wrongly decided that a notice of special defence filed by the defendants was not a sufficient notice to enable the defendants to rely on the Public Authorities Protection Act, 1893, as a defence. That depends upon Order x., rr. 14 and 18, of the County Court Rules. Rule 14 provides that "Where a defendant intends to rely on the defence of any statute of limitations his statement shall be according to the form in the appendix," and the form given in the appendix, Form 85, is "That the claim for which the defendant is summoned is barred by a statute of limitations." For some reason, into which it is not necessary to inquire, the form of pleading required in the county court is less particular than the form required in the High Court. By the High Court Rules it is required that where a statute of limitations is pleaded the pleading should state which of such statutes is relied on. In the county court that is not necessary. There r. 18 of Order x.

provides that "When in any action the defendant relies on any statutory defence . . . . he shall in his statement (except in the case provided for by rule 14 of this Order) set forth the year, chapter, and section of the statute, or the short title thereof, and the particular matter on which he relies, or otherwise sufficiently indicate the nature of the defence on which he relies." The first question here is whether the Public Authorities Protection Act is properly described as a statute of limitations. If it is, the deputy judge was wrong in holding that it was not properly pleaded here. If it is not, the question may arise whether the defendants did not "sufficiently indicate the nature of the defence" on which they rely. There is no definition of the expression "statute of limitations," but in my opinion it cannot be confined to statutes which by their title are so styled. If it were so it would exclude such a statute as the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), which has always been treated as a statute of limitations. At the same time I do not think it right to hold that every statute which imposes a limitation upon a right of action is necessarily a statute of limitations. If a statute conferred a new right of action and also prescribed a limited time within which that right of action might be enforced, it may be that it could not be properly called a statute of limitations. It is not, however, necessary to consider that point, for the Public Authorities Protection Act does not confer any new rights of action. It seems to me that prima facie any statute which imposes a limitation of time upon an existing right of action is properly called a statute of limitations. It is necessary, therefore, in each case to look at the particular statute and see what its effect is. Now in the Public Authorities Protection Act the only practically operative one of its five sections is the first, and the whole object of that section is to place restrictions of various kinds upon rights of action which a person would have apart from that statute against a public authority for any wrongful acts of its servants. That section begins by providing that "Where . . . . any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in

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respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect;—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of." It therefore presupposes an existing right of action and places upon it a limitation of time, namely, six months. Prima facie, therefore, the Act ought to be considered as a statute of limitations, and I can see nothing in the rest of the Act to prevent its being so considered. I am supported in that view by the fact that in *Gawley* v. *Belfast Corporation* (1) Holmes L.J. spoke of it as a statute of limitations. One point taken by Mr. Waddy which caused me some hesitation was the point that a statute to be properly described as a statute of limitations must be a statute of general application, applying to all persons against whom an action may be brought, whereas the Public Authorities Protection Act applies only to defendants of a particular class, namely, persons in the position of a public authority. But on reflection I do not think the contention is sound. The defendants here are expressly sued as a public authority, and in the particulars of claim they are stated to be so sued for a breach of a statutory duty imposed upon them, and I think that as soon as it appears that there is a statute imposing a limit of time for the bringing of such an action against them that statute is properly described as a statute of limitations for the purposes of the defence to the action. I think, therefore, that the deputy judge was wrong in holding that the defendants had not properly pleaded the statute and could not rely on it as a defence. With regard to the form of our judgment I do not know whether the plaintiff desires the case to be sent down for a new trial. It does not seem to have been disputed at the hearing that if the statute was properly pleaded it was a bar to the action. It has been decided by the Court of Appeal that the period of limitation runs from the act complained of and not from the death resulting from it. I do not know if the plaintiff wishes to try and get that decision overruled. If he does there must be a new trial, otherwise there must be judgment for the defendants.

(1) [1908] 2 I. R. 34.

LUSH J. I also am unable to agree with the view of the deputy county court judge as to the sufficiency of the notice of defence filed. The County Court Rules dealing with notices of statutory defence seem to divide statutes into two classes, statutes of limitation, and all other statutes. No definition is there given of a statute of limitations, but it seems to me that any statute of which one of the main objects is to limit the time within which actions of a particular class can be brought is a statute of limitations within the meaning of this rule. No enumeration of the various statutes of limitation would be complete if this statute were omitted from it. It is not as if it had created the right of action which it purports to limit, it simply adds to an existing right of action the condition that the right must be enforced within a certain limited time. But even assuming that this is not a statute of limitations within r. 14, and that r. 18 applies, I think that the notice which was filed by the defendants satisfied that rule; it sufficiently indicated the nature of the defence on which they relied. On these grounds I think the appeal should be allowed.

*Appeal allowed. Leave to appeal.*

Solicitors for defendants: *Gribble, Oddie & Co., for P. H. W. Almy, Torquay.*

Solicitors for plaintiff: *Mann & Crump, for Kitsons, Hutchings, Easterbrook & Co., Torquay.*

J. F. C.

1911
*May* 19.

## TURNER *v.* HOLDER.

*Bread—Sale by Weight—Weights suited to shew Weight of Bread carried for Sale—Bread Act*, 1836 (6 & 7 *Will.* 4, *c.* 37), *s.* 7.

The effect of s. 7 of the Bread Act, 1836, is to impose upon every person who carries out bread for sale from a cart the obligation of carrying such weights as will accurately shew the weight of the bread he purports to sell.

Case stated by justices sitting as a Court of summary jurisdiction at Epsom.

An information was preferred by Frederick Stanley Turner, the appellant, against Thomas Holder, the respondent, for having on November 18, 1910, at Leatherhead, unlawfully neglected to carry sufficient and correct weights when carrying out bread for sale or delivery, contrary to s. 7 of the Bread Act, 1836. (1)

At the hearing evidence of the following facts was given.

(*a*) That the appellant was an inspector of weights and measures for the Surrey County Council; (*b*) that the respondent was a servant in the employ of one Walter Barnes, a baker of Leatherhead, and that on November 18, 1910, the respondent was carrying out bread for sale or delivery in a cart; (*c*) that the appellant stopped the respondent on November 18,

(1) By 6 & 7 Will. 4, c. 37, s. 7, it is provided that "every baker or seller of bread [beyond certain metropolitan limits] and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales with proper weights, or other sufficient balance, in order that all bread sold by every such baker or seller of bread, or by his or her journeyman, servant, or other person, may from time to time be weighed in the presence of the purchaser or purchasers thereof . . . .; and in case any such baker or seller of bread, or his or her journeyman, servant or other person, shall at any time carry out or deliver any bread without being provided with such beam and scales with proper weights, or other sufficient balance . . . . then and in every such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding five pounds . . . ."

1910, and purchased a loaf, for which he paid 3*d.*; (*d*) that the appellant then requested the respondent to weigh the loaf. The respondent produced a beam scale and a 2 lb. weight. The appellant said to the respondent, "This is not a sufficient weight," and the respondent replied, "This is all that was given me." The respondent then tried to weigh the loaf, but could not ascertain its exact weight, but only that it did not weigh 2 lb. The appellant then weighed the loaf upon his own scale and found that it weighed less than 2 lb. The appellant then weighed several other loaves from the respondent's cart and found them all to be from $1\frac{1}{4}$ to 2 oz. less than 2 lb. (*e*) That the scale and weight were correct.

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On the part of the appellant it was contended that the respondent did not comply with the statute, as the purchaser was entitled to know the exact weight of the bread he was getting, and that the 2 lb. weight which the respondent was carrying was not sufficient without other weights to ascertain the exact weight of bread that was purchased.

On the part of the respondent it was contended that, as he only sent out in his cart half-quartern loaves, which loaves were always reputed to weigh 2 lb., and which he believed did weigh 2 lb., as they weighed 2 lb. 3 oz. before being put in the oven, a weight of 2 lb. was sufficient, as there were no other loaves in the cart; that if a customer required a loaf to be weighed and it was found to be under 2 lb. the custom was to make up the weight by cutting off and supplying a piece from another loaf sufficient to make up the weight to 2 lb.; that a bread knife was carried in the cart for this purpose; and that it was not customary and not obligatory on him to weigh a loaf unless asked to do so.

The justices were of opinion that the respondent had complied with the statute and dismissed the case.

*G. Cecil Whiteley*, for the appellant. The justices were wrong in refusing to convict the respondent. The Bread Act, 1836, provides that, except where the bread sold is what is called "fancy bread," it must be sold by weight; the baker is not at liberty to sell at so much per loaf; he must sell at so much per pound, and the customer is to be supplied with so many pounds

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of bread: see per Lush J. in *Reg.* v. *Wood.* (1) The Act also by s. 7 requires the seller of bread from any cart or carriage to be provided with proper weights. Therefore he must carry such weights as will enable him to weigh any amount of bread that the customer may reasonably ask for; at all events he must have such weights as will enable him to weigh accurately the bread he purports to sell. It is not a compliance with the requirements of the section to carry only one weight which cannot shew the weight of the loaf actually sold. [He also cited *Crick* v. *Nicholls* (2) and *Houghton* v. *Andrews.* (3)]

The respondent did not appear.

LORD ALVERSTONE C.J. In my opinion this appeal must be allowed. I do not agree with that part of Mr. Whiteley's argument where he said that a baker is bound to have such weights as will enable him to supply any weight of bread the customer chooses to ask for. A baker may, if he chooses, make his bread of one size or weight, but he must sell it by weight. I agree, however, that the Bread Act intends that the baker shall be able to satisfy the customer as to the weight of the bread he is selling. In this case the respondent was minded to make only 2 lb. loaves, but as it happened, the allowance of extra weight before the loaves were put into the oven was not sufficient, and the loaves, when taken out, were appreciably less than 2 lb. The respondent, when stopped by the appellant, had only a 2 lb. weight with him, and the consequence was that the only thing he could do, when asked for a 2 lb. loaf, was to cut off a small piece from another loaf to make up the weight. In my opinion that is not a compliance with the requirements of the statute. As I have said, the customer is not entitled to demand a particular weight of bread, but the baker must be able to weigh, and shew the weight of, the bread he purports to sell. The case must go back for the justices to convict.

PICKFORD J. I agree.

LUSH J. I am of the same opinion. Sect. 7 of the Bread Act, 1836, means that the baker must have weights which are

(1) (1869) L. R. 4 Q. B. 559, at p. 562.

(2) [1905] 1 K. B. 501.

(3) [1905] 1 K. B. 503, n.

properly suited to weigh the bread he carries in the cart; he must have such weights as will properly weigh the bread he purports to sell.

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*Appeal allowed.*

Solicitors for appellant: *Wyatt & Co., for T. W. Weeding, Kingston-upon-Thames.*

J. F. C.

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## REDHILL GAS COMPANY *v.* REIGATE RURAL DISTRICT COUNCIL.

1911

*April 6.*

*Gas Company—Breaking up Street—Persons entitled to Notice—Highway not repairable by Inhabitants at large—Persons having "control or management"—Rural District Council—Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *s.* 8.

By s. 8 of the Gasworks Clauses Act, 1847, it is enacted that before the undertakers proceed to open or break up any street they shall give to the persons under whose control or management the same may be, or to their clerk, surveyor, or other officer, notice in writing of their intention to open or break up the same, as therein directed.

A gas company, having occasion to lay a gas main under a highway dedicated to the public but not repairable by the inhabitants at large, opened and broke up the highway without giving notice to the rural district council in whose district the same was situate:—

*Held* by Lord Alverstone C.J. and Bray J. (Bankes J. dissenting), that the rural district council was not a person under whose control or management the highway was within the meaning of the above enactment.

CASE stated by the justices of Surrey.

An information was laid by Arthur John Head on behalf of the respondents, the Reigate Rural District Council, charging that the appellants, the Redhill Gas Company, on July 25, 1910, at South Merstham, in the parish of Merstham in the rural district of Reigate, being the undertakers within the meaning of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), unlawfully did open and break up a certain street there called Albury Road without giving such notice as is required by the statutes in that behalf to the respondents, or to their clerk, surveyor, or other

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officer, of their intention to open and break up the same, contrary to the provisions of the Gasworks Clauses Acts, 1847 and 1871, and the statutes of the appellants.

Upon the hearing of the information the following facts were proved or admitted. The appellants are a company incorporated by and authorized to supply gas within, amongst other parishes, the parish of Merstham, under the provisions of the Redhill Gas Act, 1865 (28 & 29 Vict. c. xiii.), as amended by the Redhill Gas Act, 1900 (63 & 64 Vict. c. viii.), which statutes incorporate the provisions of the Gasworks Clauses Act, 1847, and the appellants are the undertakers within the meaning of the Gasworks Clauses Act, 1847.

The respondents are the rural district council for the rural district of Reigate, comprising the parish of Merstham.

In or about the year 1892 a certain new street, called Albury Road, in the parish of Merstham, was laid out by the owners of the land over which the same passes, and in the year 1898 the same was made up at the expense of the frontagers and taken over by the respondents under the provisions of the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), and declared repairable by the inhabitants at large.

Albury Road as so made up and taken over by the respondents as aforesaid ended at a road called Manor Road. On or about May 12, 1904, the owners of land lying between Manor Road and an ancient highway called Worsted Green Lane notified the respondents by letter of their intention to form or lay out a street from the point at Manor Road to Worsted Green Lane and to dedicate the same as a highway. Such owners subsequently deposited plans with the respondents shewing an intention to lay out and construct a new street 40 feet wide from Manor Road to Worsted Green Lane in accordance with the by-laws in force in the parish, and the respondents duly approved such plans, and the new street was in the year 1905 laid out and constructed in accordance with such plans under the superintendence of the respondents' surveyor. The new street forms an extension of Albury Road and is hereinafter referred to as the extended part of Albury Road.

The respondents in or about the year 1904 laid a sewer along

the line of the extended part of Albury Road for the convenience of houses about to be erected in the said street. The extended part of Albury Road is about 485 feet in length, and has been open to the public for all purposes since its construction in 1905. It is a highway for all kinds of traffic, but is not repairable by the inhabitants at large and has never been repaired by the respondents. The appellants on July 25, 1910, with the consent of the owners of the soil, opened and broke up the extended part of Albury Road and laid a gas main under the road at a depth of 2 feet 6 inches and restored the surface of the road. The appellants did not before the opening and breaking up of the extended part of Albury Road give notice of their intention to open the road to the respondents or to their clerk, surveyor, or other officer.

On behalf of the appellants it was contended that the respondents were not the persons having the control or management of the extended part of Albury Road within the meaning of s. 8 of the Gasworks Clauses Act, 1847 (1), because the extended part of Albury Road was not repairable and had

(1) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 3: "The word 'street' shall include any square, court, or alley, highway, lane, road, thoroughfare, or public passage or place within the limits of the special Act."

Sect. 8: "Before the undertakers proceed to open or break up any street, bridge, sewer, drain, or tunnel, they shall give to the persons under whose control or management the same may be, or to their clerk, surveyor, or other officer, notice in writing of their intention to open or break up the same, not less than three clear days before beginning such work, except in cases of emergency arising from defects in any of the pipes or other works, and then so soon as is possible after the beginning of the work, or the necessity for the same shall have arisen."

Sect. 11: "If the undertakers open or break up any street or bridge, or any sewer, drain, or tunnel, without giving such notice as aforesaid . . . . they shall forfeit to the persons having the control or management of the street, bridge, sewer, drain, or tunnel, in respect of which such default is made, a sum not exceeding five pounds . . . ."

Sect. 40: "If the gasworks be in England or Ireland, the clauses of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of . . . . penalties . . . . shall be incorporated with this and the special Act . . . ."

Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 145: "Every penalty . . . . imposed by this or the special Act . . . . the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices . . . ."

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never been repaired by the respondents, and that the appellants were therefore entitled to lay their pipes in the said road with the consent of the owners of the soil without giving notice to the respondents and without their superintendence.

On behalf of the respondents it was contended—

(*a*) That the extended part of Albury Road was a street within the meaning of s. 8 of the Gasworks Clauses Act, 1847, having regard to the definition of "street" contained in s. 3, and to the fact that it was dedicated to the public use as a carriageway and was and is a highway, and

(*b*) That the same was under the control or management of the respondents as highway and sanitary authority within the meaning of the said Act (although not yet repairable by them), and that it was therefore the duty of the appellants pursuant to s. 8 of the said Act to give notice of their intention to open or break up the said street to the respondents or to their clerk, surveyor, or other officer.

The justices were of opinion, having regard to ss. 25 and 26 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), that all highways (whether repairable by the public or not) within the district of a rural district council are under the control or management (within the meaning of s. 8 of the Gasworks Clauses Act, 1847) of such council as the successors of the previously existing highway board or surveyor of highways, and that therefore notice should have been given to the respondents by the appellants of their intention to open or break up the extended part of Albury Road, and they convicted the appellants.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

*Macmorran*, K.C., and *Bethune*, for the appellants. Highways do not come under the control of local authorities unless and until they are or become repairable by the inhabitants at large: see s. 149 of the Public Health Act, 1875 (38 & 39 Vict. c. 55). The position of rural district councils is defined by ss. 25 and 26 of the Local Government Act, 1894. Sect. 25 simply transfers to them the powers and duties formerly exercised and performed by the surveyor of highways under the Highway Act, 1835 (5 & 6

Will. 4, c. 50), which had by s. 144 of the Public Health Act, 1875, been vested in and imposed upon the urban sanitary authorities. Sect. 26 gives the rural district councils certain powers of interfering when attempts are made to stop up or obstruct highways outside their districts, where the stoppage or obstruction would be prejudicial to the interests of their districts. Neither of these sections purports or operates to give to rural councils the control or management of highways not repairable by the inhabitants at large. For the purposes of this case their position with regard to such highways is simply that of the surveyor of highways under the Highway Act, 1835. He was not liable to repair highways which were not repairable by the inhabitants at large. It is true that certain special and often merely ministerial duties were imposed upon him with respect to such highways, but he could not be said to have the general control or management of them. Of the three classes of highways, (1.) private roads not dedicated, (2.) highways dedicated but not taken over by the local authority, (3.) highways dedicated and taken over by the local authority, the person having the control or management of the first class is the owner of the soil; of the third class, the local authority; of the second class it may be that nobody has the control or management. The owner has not, because by dedication he has parted with it: *Reg.* v. *Wilson* (1); and as nobody else has assumed the control the highway remains derelict, to be used by the inhabitants at large so long as they can or wish to use it. In this case control goes with liability to repair. So in the case of a highway repairable ratione tenuræ: *Reg.* v. *Wilson.* (1) But where there is no liability to repair there is no control or management within the meaning of s. 8 of the Gasworks Clauses Act, 1847. This is not unreasonable, because the only object of providing that notice shall be given to the person having the control or management is to prevent the undertakers from imposing a greater burden on the persons liable to repair the road. The case of *Hill* v. *Wallasey Local Board* (2), which was cited to the justices, has no application to the present case; it was merely a decision upon the words in s. 57 of the Public

(1) (1852) 18 Q. B. 348. (2) [1894] 1 Ch. 133.

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Health Act, 1875, "where the local authority have not the control of the streets." The street in question in that case was no doubt a private road, but there is no decision that the local authority had control of that road.

*C. A. Russell, K.C.*, and *W. Mackenzie*, for the respondents. According to the appellants' contention control or management means liability to repair. If that was the meaning of the Legislature why were words used which conceal it? The respondents are the persons under whose control or management the street in question is. By s. 144 of the Public Health Act, 1875, it was enacted that urban sanitary authorities should execute the office of surveyor of highways. By s. 25 of the Local Government Act, 1894, the powers, duties, and liabilities of the urban sanitary authority as respects highways were transferred to the rural district council. The respondents are therefore the successors to the surveyor of highways. It is impossible to say that the surveyor of highways was not a person having the control or management of highways not repairable by the inhabitants at large. By s. 5 of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), the word "highways" means all roads, bridges (not being county bridges), carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements." Over these highways the surveyor had large powers of control and management. By s. 24 he had to erect at the entrance or approach to highways subject to dangerous floods graduated stones or posts as he should judge necessary for guiding travellers and to secure causeways from damage by wagons, &c. By s. 26 he was directed to remove obstructions from snow or landslips. By s. 64 he was to see to the removal of all trees within a distance of 15 feet from the centre of any carriageway or cartway. By s. 65 he could bring before a justice of the peace any owner of land whose hedges were not properly pruned whereby any carriageway or cartway was prejudiced or obstructed. By s. 67 he had power to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, and to make trunks, tunnels, plats, or bridges in any lands lying near a highway. Sect. 69 enacts that persons encroaching on a highway by making a building, hedge, ditch, or other fence on

any carriageway or cartway within 15 feet from the centre shall be liable to forfeit a sum not exceeding forty shillings. The words which follow are important, "and the surveyor who hath the care of any such carriageway or cartway" shall cause such building, hedge, ditch, or fence to be taken down or filled up at the expense of the person to whom the same shall belong. By s. 73 he was empowered to give notice to any person depositing any timber, stone, &c., upon any highway so as to be a nuisance, to remove the same, and, if this is not done, to get an order from a justice for the removal of the nuisance. By s. 74 he was empowered to impound cattle straying on a highway or on the sides thereof. Moreover by s. 26 of the Local Government Act, 1894, it is the duty of a rural district council to protect all public rights of way and to prevent the stopping up and obstruction of any such right of way, not only within their own district, but in an adjoining district in the county or counties in which the district is situate, where in their opinion the stoppage or obstruction would be prejudicial to the interests of their district; it is also their duty to prevent any unlawful encroachment on any roadside waste within their district; and on the representation of a parish council that obstructions and encroachments of this kind are taking place, it is the duty of the district council to take proceedings. In order to constitute a way dedicated to the public a public highway it is not necessary that it should be repairable by the inhabitants at large: *Roberts* v. *Hunt.* (1)

*Bethune* in reply.

BANKES J. I find myself in disagreement with the other members of the Court and therefore give my opinion with much diffidence. The question is whether the rural district council are "persons under whose control or management" the road in question is, within the meaning of s. 8 of the Gasworks Clauses Act, 1847. It is a road which has been dedicated to the public, but which has never been repaired by the inhabitants at large, and has never been taken over by the local authority so as to become so repairable; it is therefore in the same category as

(1) (1850) 15 Q. B. 17.

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roads dedicated since the passing of the Highway Act, 1835, with regard to which the provisions of that Act had not been complied with. It must be borne in mind that the Gasworks Clauses Act, 1847, is a general Act prescribing the powers to be given to private undertakers to interfere with public and private roads for the purposes of their undertaking. It may be that more than one person is contemplated as the person having the control or management; but the only person we have to consider is the surveyor of highways, and the question in the case is whether in the year 1847 the surveyor of highways was a person having the control or management of such a road as that in question. We have been referred to several sections of the Highway Act, 1835, which confer upon the surveyor of highways very considerable powers of control and management over roads such as this; and in my opinion those sections constituted him a person in whom the control or management of such roads is vested within the meaning of s. 8 of the Gasworks Clauses Act, 1847. If I am right in this view, it follows that the respondents are in the same position, because the powers of the surveyor of highways were by s. 25 of the Local Government Act, 1894, transferred to rural district councils. It may be that ss. 25 and 26 do more than merely transfer those powers; possibly s. 26 confers powers wider than those vested in the surveyor of highways, but it is not necessary to decide that question now. I think that on the passing of the Highway Act, 1835, the surveyor of highways was invested with powers which, on the passing of the Gasworks Clauses Act, 1847, constituted him a person having the control or management of roads like that in question within the meaning of s. 8 of that Act. In my opinion, therefore, this appeal should be dismissed; but my opinion does not prevail.

BRAY J. It cannot be denied that this is a case of some difficulty, because at the date of the Gasworks Clauses Act, 1847, the expression "control or management" was not an expression in general use or having any technical meaning. We must construe the words as best we can, giving them their natural meaning. First, was the surveyor of highways a person who could be said to have the general control of a road like this

not repairable by the inhabitants at large? The powers conferred upon him by the various sections of the Highway Act, 1835, are merely special powers to be exercised in special circumstances, sometimes in pursuance or execution of an order of justices, and in my view those sections cannot be said to have conferred upon the surveyor of highways the control or management of roads not repairable by the inhabitants at large. It is well to consider what statutory provisions there are for putting a highway under the control of a local authority. By s. 149 of the Public Health Act, 1875, it is provided that all streets, being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority. That implies that those highways and no other are to be under the control of the local authority. It is remarkable that this enactment placing highways under the control of the authority should be in terms confined to those highways which are repairable by the inhabitants at large, if, as the respondents contend, all highways repairable or not were already by law under the control of the surveyor of highways. I have some difficulty in saying who is the person having the control or management of a road in the condition in which this road is, dedicated to but not yet taken over by the public. I do not think it necessary to solve that doubt. The Act seems to contemplate somebody as the person having the control or management; and generally there would be such a person; before dedication the owner would be the person, and after taking over by the local authority that authority would be the person. In the interval between dedication and adoption by the local authority it may be that there is no person having the control or management, and that for a short period the road may be, so to speak, derelict. Be that as it may, I do not think that at the date of the Gasworks Clauses Act, 1847, the surveyor of highways was the person having the control or management of highways not being repairable by the inhabitants at large. Then has a rural district council any higher or wider powers? Sect. 25

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of the Local Government Act, 1894, enacts by sub-s. 1 that there shall be transferred to the district council of every rural district all the powers, duties, and liabilities of the rural sanitary authority in the district, and of any highway authority in the district, and highway boards shall cease to exist, and rural district councils shall be the successors of the rural sanitary authority and highway authority, and shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under ss. 144—148 of the Public Health Act, 1875, and those sections shall apply in the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority. Sub-s. 2 deals with highways repairable ratione tenuræ, and enables the rural district council in certain events to repair such a highway and recover the cost from the person liable to repair it. The remaining sub sections of s. 25 are not material. In my opinion this section does not give the district council the control or management if the highway authority had not got it. Then as to s. 26, whether I am right or wrong in saying that the surveyor of highways was not a person having the control or management of highways not repairable by the inhabitants at large, I do not think that this section confers on the rural district council any such control or management. It merely imposes certain duties and confers certain powers upon those bodies of interfering with the stopping up or obstruction of rights of way in their own district or in an adjoining district, in the case where a person claims to stop or obstruct in an adjoining district a right of way the stoppage or obstruction of which would be prejudicial to the interests of their own district. That section does not in my view operate to make the rural district council persons having the management or control within the meaning of s. 8 of the Gasworks Clauses Act, 1847, of roads not repairable by the inhabitants at large. Therefore I think that this appeal ought to be allowed.

Lord Alverstone C.J. I agree with the judgment of Bray J. for the reasons he has given. Apart from any additional powers conferred on rural district councils by the Local Government Act, 1894, over and above the powers and duties formerly vested

in and imposed upon the surveyor of highways, the respondents must fail unless they can shew that the surveyor had the control or management of such a road as the one in question in this case. When I consider the scope of the Highway Act, 1835, it appears to me that control over and management of certain highways was entrusted to the surveyor in so far as was necessary to keep them in repair, because s. 6 of that Act, which provides for the appointment of a surveyor, concludes with these words: "which surveyor shall repair and keep in repair the several highways in the said parish for which he is appointed, and which are now or hereafter may become liable to be repaired by the said parish." That seems to indicate that his general powers of control were confined to roads liable to be repaired by the parish. He is also invested with other special powers applying to highways which are not, as well as to those which are, repairable by the parish. Mr. Russell for the respondents contends that to confer such powers upon the surveyor is to invest him with the control and management of the highways over which he may exercise those powers. I do not agree. In my judgment the test is the liability of the inhabitants to repair. Since the passing of the Highway Act, 1835, there is no general duty upon the inhabitants to make up or take over all roads dedicated as highways. If this particular road should become foundrous, neither the inhabitants at large, nor any local authority representing them, would be bound to repair it unless and until notice were given to frontagers under s. 150 of the Public Health Act, 1875, or private street works were executed under the Private Street Works Act, 1892. Thereupon under s. 152 of the Public Health Act, 1875, or s. 19 of the Private Street Works Act, 1892, as the case may be, the road may be declared to be a highway repairable by the inhabitants at large; and then, and not till then, it comes under the control of the local authority. Therefore in my view it cannot be successfully contended that before the passing of the Local Government Act, 1894, the surveyor of highways was a person having the control or management of this road. I do not derive much assistance from the case of *Reg.* v. *Wilson*. (1) On the one hand, as was argued by the respondents, the words in that case

(1) 18 Q. B. 348.

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"trustees, commissioners, surveyor, or other person having the management of the road" bear in their favour; at any rate their position is certainly not weakened by the fact that in another statute the surveyor is described as a person having the management of the road. But as against that the important words in the present case are "the persons under whose control or management the same"—i.e., the street, &c.—"may be, or to their clerk, surveyor, or other officer." Those words are hardly applicable to the surveyor of highways.

Then has the Local Government Act, 1894, conferred upon a rural district council any powers in this respect greater than those vested in the surveyor of highways by the Highway Act, 1835? In my view s. 25, sub-s. 1, of the Local Government Act, 1894, merely effects a transfer of powers; sub-s. 2 seems to bear slightly against the respondents; it was the first enactment which gave a local authority power to repair a highway repairable ratione tenuræ and to recover the expense from the person liable to repair. That is an enactment expressly conferring a new power, which seems to exclude the intention of conferring other powers by implication. With regard to s. 26, giving a rural district council power to intervene in case of the stoppage or obstruction of roads outside as well as inside their district, any effect we may justifiably attribute to it must fall far short of conferring upon that authority the management and control of those roads. Neither does their position as successors to the surveyor of highways confer upon them such management or control; and therefore in my opinion this appeal must be allowed.

*Appeal allowed.*

Solicitors for appellants: *Radcliffe, Cator & Hood.*

Solicitors for respondents: *Turner & Evans, for Morrisons & Nightingale, Reigate.*

W. H. G.

## LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY *v.* BENNETT.

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*March* 28, 29.

*Revenue — Income Tax — Company — Foreign Investments — Interest of, not remitted home—Income Tax Act,* 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, First Case—Income Tax Act,* 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

A fire and life insurance company which carried on business both at home and abroad was registered in this country and had its head office and board of direction here. By the laws of certain of the foreign countries in which it so carried on business an insurance company was required, as a condition of permission to carry on business there, to deposit with the Governments of those countries certain sums of money and to invest those sums in accordance with the local laws. In pursuance of those requirements the company invested certain sums in those countries. It also voluntarily invested there certain other sums representing accumulated profits of its business. Both classes of investments yielded interest which was received by the company abroad, but was not remitted to the United Kingdom :—

*Held*, that the interest on both classes of investments was part of the profits or gains accruing to the company from the trade of insurance carried on by it, and was assessable to income tax under the first case of Sched. D.

Case stated by Commissioners of Income Tax.

1. At a meeting of the Commissioners for Special Purposes of the Income Tax Acts held in the city of Westminster on April 4, 1908, and by adjournment on May 1, 1908, and May 26, 1909, the Liverpool and London and Globe Insurance Company appealed against the undermentioned assessments made upon them by the additional Commissioners of Income Tax for the division of Liverpool under Sched. D in respect of the profits of the insurance (fire and life) and annuity business carried on by them, namely :—

For the year 1903 ended April 5, 1904, in the sum of 104,119*l.*

| | | | | | |
|---|---|---|---|---|---|
| ,, | 1904 | ,, | 1905 | ,, | 200,000*l.* |
| ,, | 1905 | ,, | 1906 | ,, | 250,000*l.* |
| ,, | 1906 | ,, | 1907 | ,, | 250,000*l.* |

2. At the hearing of the appeal the following facts were proved :—

In 1904 an Act of Parliament, 4 Edw. 7, c. xxxiv., was passed

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providing for the registration of the company under the Companies Acts, 1862 to 1900, and for the substitution of a memorandum and articles of association for its previous constitution and regulation. By clause 18 of the memorandum one of the objects for which the company was established was "To invest the moneys of the company not immediately required in such manner as may from time to time be required."

The head office of the company is at Liverpool, but it carries on business through agencies and branches not only in the United Kingdom but in the colonies and abroad. The company has large sums of money invested in various securities, possessions and properties, some in the United Kingdom, and some in other parts of the world. The question raised by this appeal arises with respect to investments in the United States of America, in Canada, and in Australia, in which countries the only business carried on by the company is that of fire insurance. The investments in those three countries may be divided into three classes designated for the purposes of this case classes A, B, and C.

Class A have been made by the company in the United States and in Canada under the following circumstances. In six of the States where the company does business (namely, New York, Ohio, Oregon, Virginia, Georgia, and New Mexico) and in Canada it is required as a condition of a foreign insurance company doing fire insurance business there that the company should deposit certain minimum amounts with a representative of the Government or trustees who pledge themselves to the Government not to part with the deposits. The sums so deposited must be invested in accordance with the local laws of the said States and Dominion. The company has accordingly been required to make and has made in the said States and in the said Dominion the various deposits required by law as a condition of carrying on business as aforesaid, and so long as it carries on business therein or any liability remains in respect of any risk in the said States or Dominion (as the case may be) they are by law unable to recover possession of any part of the sums so deposited, but the same are held as a fund out of which in the case of non-payment of

claims by the company the policy-holders of the company in the said States and Dominion can be paid.

Class B of the investments have been made by the company in the State of New York and in Canada under the following circumstances. In addition to the obligation imposed by law upon the company to make the fixed deposit mentioned in the preceding paragraph it is also required by law—

(*a*) In New York, that an insurance company doing fire insurance business in the said States may not undertake and keep by way of insurance on any one risk an amount exceeding one-tenth of what is termed in this case "the surplus" of such company. The term "surplus" means the amount which is arrived at by deducting all the liabilities of the company in the whole of the United States from such of the assets of the company in the whole of the United States as are either (1.) deposited on fixed deposit in any State of the United States in accordance with the requirements of the law of such State as mentioned in the preceding paragraph, or (2.) are invested in any form of investment in the United States permitted by the insurance laws of the State of New York, if and so long as such investments are invested and held in the United States by trustees who are American citizens and are approved by the Superintendent of Assurance of the State of New York. In order to undertake and keep such an amount on any one risk as the company may desire the company has been compelled, under the provisions of the law above referred to, to make considerable deposits with trustees in the United States beyond the fixed deposits described in the preceding paragraph. The limitation imposed extends only to the total amount undertaken on any one risk, and does not restrict the number of different risks that may be undertaken.

(*b*) In Canada, that an insurance company doing fire insurance business in Canada but incorporated elsewhere than in Canada and authorized by its charter to also carry on life and other branches of insurance shall keep and maintain assets in Canada in excess of its liabilities to policy-holders in Canada at such an amount as the Treasury Board shall determine. For this purpose the assets of the company in Canada are deemed to consist of the deposits mentioned above and such assets as have been vested in trust for

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the company in two or more persons resident in Canada and approved by the Minister of Finance and are of a character approved by the Treasury Board. The company has accordingly been required to make considerable deposits with trustees in Canada beyond the fixed deposits mentioned above.

The funds representing the further moneys necessarily deposited in the United States and Canada in order to comply with the aforesaid laws of the State of New York and the Dominion of Canada, although they cannot in the ordinary course of business be used by the company for the purpose of meeting current losses or defraying current expenses, are intended to constitute a trust fund for the protection of the company's policy-holders in the said States and Dominion. As regards classes A and B the laws of the United States and Canada do not prevent the company changing or varying the deposited investments if they so desire, provided the substituted investments comply with the statutory requirements.

Class C of the investments have not been made by the company under or by reason of any legal obligation whatever, and are investments made in the United States, Canada, and Australia for the purpose of deriving income or profit from moneys of the company. These sums consist of accumulated profits made in the past years, but not distributed among the shareholders, which the directors have invested in high-class securities in order to have a fund easily realizable if required. Generally it has not hitherto been necessary for the company to realize or expend any part of these moneys for the immediate purpose of carrying on their business as insurers, but they are available like any other property owned by the company for such purpose or any other purpose of the company whenever the company may think fit or necessary.

The investments referred to in all the aforesaid three classes produce annually or from time to time interest and dividends, which interest and dividends have been paid to and received by the agency or branch of the company in the State, dominion, or country where the money from which such interest or dividends arose is invested or deposited. None of the sums so received by the company or its agents or branches by way of interest or

dividends arising from the deposits or investments aforesaid are in fact remitted in forma specifica to the United Kingdom. The actual amounts so retained abroad and not remitted home in the years 1900, 1901, 1902, 1903, 1904, 1905, and 1906 were not ascertained by the Commissioners, it being arranged between the parties that these amounts could be ascertained and agreed on at a later date if necessary.

Although no part of the interest and dividends arising from the company's said deposits and investments abroad have been in fact remitted in forma specifica to the United Kingdom the whole amount is duly credited in the United Kingdom in the company's books and brought into all its accounts, where appropriate, including its profit and loss accounts.

As a general rule the liabilities of the company accruing in the United States and the Dominion of Canada can be met out of the profits the company has there, that is to say, the dividends or interest received from the moneys invested as hereinbefore set out in classes A, B, and C, and the premiums which are paid to it. But should extraordinary circumstances arise the company could and would meet the claims made upon it by drawing upon its investments.

3. It was contended on behalf of the company—

(*a*) That the dividends or interest arising from the said three classes A, B, and C of deposits and investments were none of them assessable to income tax under the Income Tax Acts.

(*b*) That the said three classes of deposits and investments were standing aside from and outside of the carrying on of the business and employment therein, and that the motive why that was so was immaterial, and hence the profits therefrom form no part of the profits of the business within case 1 of Sched. D or otherwise.

(*c*) That as the interest and dividends arising from the said three classes of deposits and investments had been retained and reinvested abroad neither the interest nor the dividends were liable to income tax.

(*d*) That the case of *Gresham Life Assurance Society* v. *Bishop* (1) applied.

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(*e*) That as the interest and dividends from the said three classes of deposits and investments were not remitted to or received in the United Kingdom they are not liable to assessment to income tax, whether under case 4 or case 5 of Sched. D or otherwise.

(*f*) That they are not taxable under case 1 of Sched. D of the Income Tax Act, 1842, as profits or as part of the profits of the business mentioned in paragraph 1 hereof as being carried on by the company.

4. It was contended on behalf of the Crown—

(*a*) That the investment of the company's moneys as specified in classes A, B, and C is an essential part of its business without which it could not undertake or carry on the business of insurers.

(*b*) That the interest and dividends arising from investments necessarily made for the purpose of a business form part of the profits and gains of that business.

(*c*) That the whole of the profits and gains of the company including all such interest and dividends have been properly assessed in one sum under case 1 of Sched. D of the Income Tax Act, 1842.

(*d*) That as the assessments are under case 1 it is immaterial whether the interest and dividends were remitted to or received in the United Kingdom or not.

(*e*) That the case of *Gresham Life Assurance Society* v. *Bishop*(1) does not apply inasmuch as in that case the assessment was not under case 1 in respect of profits, but under case 4 in respect of securities out of the United Kingdom the interest on which was not remitted to this country.

. . . . . .

6. Having regard to the manner in which the "liabilities" and "assets" are set out in the company's balance-sheet, and to the fact that insurers, in considering what would be the nature and extent of their security, would have regard to the total amount of the assets of the company, and having considered the facts of the case as hereinbefore stated and the provisions of the

(1) [1902] A. C. 287.

income tax law relating thereto the Commissioners gave judgment as follows:—

They were of opinion that the contention of the Crown is correct. They found that the investments in question made by the appellant company in the foreign countries named were made in the carrying on of, and were part of, its business transactions, and they held that the interest on such investments should be included as receipts of the company in arriving at its liability under case 1 of Sched. D.

They adjourned the case for the parties to discuss figures and to submit to them the sums at which under such judgment on the foregoing point of law the several assessments for the years in question should be respectively fixed.

7. At the adjourned meeting held on May 26, 1909, the Commissioners reduced the assessments to the following sums:—

For the year 1903, ending April 5, 1904, to 103,359*l.*
„ 1904 „ „ 1905 „ 187,789*l.*
„ 1905 „ „ 1906 „ 208,423*l.*
„ 1906 „ „ 1907 „ 243,588*l.*

The question of law for the opinion of the Court is whether the Commissioners were right in concluding from the facts set out herein that the whole of the interest and dividends arising from the several investments under class A, class B, and class C (whether actually remitted to the United Kingdom or not) form part of the profits of the company assessable under case 1 of Sched. D of the Income Tax Act, 1842.

*Danckwerts*, *K.C.*, and *Latter*, for the appellants. The profits accruing to the appellants from their trade of insurance does not include the interest received by them from any of the three classes of investments. Such interest does not fall within the first case of Sched. D. It falls either within the fourth case as "foreign securities" or the fifth case as "foreign possessions," and not being received by the appellants in this country it is not taxable. The finding in par. 6 of the case that the investments were part of the company's business transactions was not intended to be a finding of fact; it is merely a statement of opinion upon the question of law which is reserved for the Court. The

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investments in class A have to be made as a condition precedent to the carrying on of any business, and those in class B as a condition precedent to the carrying on of a particular class of business. Both classes must continue as long as the business is carried on, by way of security for the due discharge by the company of its obligations. But they are not employed in carrying on the business of insurance; they are entirely collateral to it. A distinction is to be drawn between operations which produce profits and preliminary operations. In *Sulley* v. *Attorney-General* (1) the defendant, a partner in a firm, resided in England, the other partners residing at New York, where the principal business of the firm was carried on. The defendant bought goods in England and shipped them to New York, where they were resold at a profit. It was held that the exportation of the goods by the defendant was not the carrying on of a business here and that the firm were not liable to income tax on the profits of the resale except so far as they were remitted to this country. So here making a deposit as a preliminary to carrying on a trade is no part of the carrying it on. Similarly in *Dillon* v. *Corporation of Haverfordwest* (2), where a local Act imposed a duty on the corporation to light the town and further allowed them after lighting the town to supply private customers with gas, it was held that the lighting of the town and supply of gas to private customers were separate operations, and that therefore the corporation could not in the return of their profits for the purpose of income tax deduct the expenses of lighting the town.

In this country every insurance company is required by the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 2, to deposit 20,000*l.* with the Paymaster-General, who invests the money and pays the interest to the company. But the very essence of that deposit is that the money is not embarked in the company's trade and not subject to the risks of that trade. Still less can the interest of the investments in class C be regarded as part of the profits of the business of insurance. Mere investment for investment's sake is not a business at all. For instance, a barrister who invests his savings does not thereby

(1) (1860) 5 H. & N. 711. (2) [1891] 1 Q. B. 575.

carry on a trade. And the fact that the company's possession of a large reserve of invested funds may give them credit with the public and so attract business is immaterial. The money is not on that account to be regarded as embarked in trade, any more than the invested private fortune of an underwriter or banker could be so regarded.

[HAMILTON J. The case of an individual trader does not seem analogous to that of a company whose powers of investment are limited by the memorandum and articles of association.]

Here the investments in question were made under clause 18 of the memorandum of association, which expressly limits the power of investment to "moneys of the company not immediately required," that is to say, not required for the purposes of the trade. It places those investments wholly outside the trade. In *Smiles* v. *Australasian Mortgage and Agency Co.* (1), where wool brokers made advances on mortgage of wool, the advances being for no fixed period and the interest fluctuating, the Court of Session held that the advances were part of their business of woolbroking, and that the interest on them was taxable under the first case and not under the fourth, but Lord Shand said that "If a banking company or insurance company made investments of their realized funds in stocks in the colonies which were paying them interest periodically, that would, so far as these investments were concerned, be a very different matter"—that is to say that they would be taxable only under the fourth case, and to the extent to which the interest was received here. That passage is relied on as being directly in the appellants' favour. There is indeed a dictum of Wright J. in *Norwich Union Fire Insurance Co.* v. *Magee* (2) which is against the appellants' contention. He there said: "If there is a trade which cannot be carried on without making investments abroad, the interest arising on the investments necessarily made for the purposes of the trade is, as it seems to me, part of the gains of that trade." But that dictum was only obiter. The ratio decidendi there was that the bringing into account, for the purpose of making up the company's balance-sheet, of interest on foreign investments amounted to a constructive

(1) (1888) 15 R. 872. (2) (1896) 73 L T. 733

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receipt of it in this country—a proposition which has since been overruled in *Gresham Life Assurance Society* v. *Bishop*. (1) Nor is the proposition laid down by the Court of Session in *Scottish Union and National Insurance Co.* v. *Inland Revenue* (2), that "Interest on investments which has not suffered deduction of income tax at the source must be taken into account in ascertaining the assessable amount of profits and gains of the company," an authority against the present appellants, for there was nothing in that case to shew that the investments were made abroad. It was decided on the assumption that all the company's income was derived in the United Kingdom. It is clear that if the interest in the present case had been remitted home it would have been taxed under the fourth case. That shews that it is not liable to be taxed under the first case.

*Sir John Simon, S.-G.*, and *Finlay*, for the respondent. The interest on the foreign investments ought to be brought into account in computing the balance of the profits or gains of the appellants' trade of insurance. The assumption that because a particular subject is rightly taxed under one case it is not also taxable under another cannot be supported. The first and fourth cases are not mutually exclusive. In *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (3) Lord President Inglis said: "One can quite understand that in particular circumstances the duty may be chargeable either under the one or the other. The income in respect of which the duty is to be charged may fall under more than one description in the statute, and in that case it would of course be in the option of the Commissioners of Inland Revenue to take the case that was most favourable to themselves." And in *Revell* v. *Edinburgh Life Insurance Co.* (4) Lord Dunedin says the same thing, that the Crown may elect between the two. The judgment of Lord Fitzgerald in *Last* v. *London Assurance Corporation* (5) is an authority that the interest on the invested money of an insurance company is to be treated as part of the profits of the insurance business.

(1) [1902] A. C. 287.
(2) (1889) 16 R. 461.
(3) (1886) 2 Tax Cases, 165.
(4) (1906) 5 Tax Cases, 221.
(5) (1885) 10 App. Cas. 438, at p. 451.

And in *Clerical, Medical and General Life Assurance Society* v. *Carter* (1) it was assumed by the Court throughout that the investment of money was part of an insurance company's business, and that the interest on the investments ought to be brought into the calculation of the profits. The passage already referred to in the judgment of Wright J. in *Norwich Union Fire Insurance Co.* v. *Magee* (2) is a clear authority that classes A and B of the investments in the present case would fall within the first case. But he did not by limiting his proposition to investments which the company was compellable by law to make mean to exclude voluntary investments. Such investments equally form part of the business of the company. An insurance company only exists for the purpose of making profits by its business of insurance. The investment of funds is a necessary part of that business, and for such a company to make investments except for the purpose of its business would be ultra vires. It may not lawfully retire from business and live on its investments; it is bound to use its money for the purpose of earning profits within the scope of its association. No analogy, therefore, can be drawn between a trading company and an individual trader who can invest how and to what extent he pleases. With regard to the finding in par. 6 of the case that the investments were made by the appellants in the carrying on and as part of their business, the Crown is willing to treat that, not as a finding of fact, but as a mere statement of opinion not intended to preclude the Court from holding the contrary as a matter of law.

*Danckwerts, K.C.*, in reply.

HAMILTON J. The question in this case is whether, when a limited liability company, carrying on the business of fire insurance both in this country and abroad but having the principal direction of its business in the United Kingdom, invests upon securities abroad sums of money which it does not require for the current discharge of its liabilities, and receives abroad in respect of those securities dividends which are not remitted to this country, it can be assessed to income tax under Sched. D in respect

(1) (1889) 22 Q. B. D. 444. (2) 73 L. T. 733.

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of those dividends as being profits or gains accruing to it from the trade of insurance. The company possesses branches in the United States, in Canada, and in Australia, and makes investments of three classes in securities abroad in connection with those branches. Class A, which is a class referring to six of the United States and to the Dominion of Canada, consists of investments made for the purpose of complping with the laws of those countries, which require that as a condition of doing fire insurance business there the company shall deposit certain minimum sums with a representative of the Government or with trustees who pledge themselves to the Government not to part with the deposits. These sums are required to be invested in accordance with the local laws of the countries in question. The second class, B, applies to the State of New York and to the Dominion of Canada, the laws of which require that a company doing fire insurance business there shall under the following circumstances make certain further investments in addition to the fixed deposits already mentioned. The law of New York requires that there shall be a certain proportion between the amount of what is called amongst underwriters the company's "retained line," that is to say, the business by way of insurance on any one risk which the company may undertake and keep, and the amount of what is called a "surplus" of assets available for meeting the liabilities, and that if the company desires to increase the amount of its retained line it must also increase the amount of the investments deposited with trustees; while the law of Canada requires that a company incorporated elsewhere and authorized to carry on the business of life insurance shall keep a certain amount of assets in Canada in excess of its liabilities to Canadian holders of fire policies. In the case of both classes A and B the local laws do not prevent the company from changing the deposited investments or from receiving the dividends. The third class, C, consists of investments made by the company abroad voluntarily and not under any legal obligation for the purpose of deriving income from its accumulated funds. The contention on the part of the Crown is that the surveyor is entitled to assess the company under case 1 of Sched. D upon profits or gains accruing from the trade of insurance, and for that purpose is entitled to have

brought into the account the amount of the dividends on the three above-mentioned classes of investments.

The contention on behalf of the company is that the purposes of the investments are such that they cannot be deemed to be profits or gains from the trade of insurance. It is said that there is an analogy between the case of the company and that of a private individual who, being a trader, happens to be possessed of a large fortune independently of his trade, and that just as the private individual has two separate departments of his affairs, the trade in which he may or may not make a profit, and the investments from which he receives an income, which it is urged are not the less separate because it may be part of the grounds of his credit as a trader that he is known to be outside his trade a man of wealth, so it is with this insurance company, although it may be part of the grounds for bringing insurance risks to its offices that it is known to be possessed of large funds outside its business, which funds it would if necessary apply in the liquidation of its insurance liabilities. I am of opinion that this analogy fails altogether and that the company's business cannot be split up in this way. The private individual may save to provide for his old age or his family; he has leisure to enjoy, he has ambitions to gratify, and his existence in fact can be separated into his private and his trading life. Nothing of the kind can be done with an insurance company. Its existence is limited by the scope of its memorandum and articles. It is a trading company and a trading company alone. It has no interests and no field of operations outside its business. Moreover an insurance company embarks its funds in its business simply by having money ready with which to pay its debts; for its business consists in making promises to pay in futuro contingent sums by way of indemnity in consideration of present payments, and in being ready to meet the liabilities if and when they accrue. Consequently the company's money is embarked in the business as soon as it belongs to it and is available for the payment of its debts. The practice of English insurance companies has, as far as I know, always been from the first to start accumulating large funds for the purpose of meeting losses. It is the very pivot of the conduct of

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a fire insurance business to build up with prudence large reserve funds, by not distributing surpluses of premiums as and when they are received, and to invest them so that they may not be fruitless while held in hand. That is the policy pursued here under class C. The making of the investments is just as much part of the mode of conducting the business as the taking of the risks, and in the event of the current account at the bank being insufficient to meet the liabilities all the invested funds may have to be called upon at some time or other. The matter is no more favourable for the company in regard to classes A or B. Class A are deposits which have to be made as a condition of entering into a closed field. In order that the company may trade in an area which it thinks it advantageous to trade in it must comply with the local laws and make the deposit. The case is therefore not like one of money being used to acquire a concern as distinguished from money being used to carry it on. In my opinion the deposits here, which have to be maintained as long as the business is carried on, constitute a disposition of the money in the way of and as part of the actual trading itself. The circumstance that the money is invested in securities and yields an income is no doubt beneficial to the company, but it only obscures the facts to dwell on that side of it. It would equally be a security if the company obtained the guarantees of bankers or bondsmen by paying them commissions, and no one could doubt that in that case the money spent in annually continuing those guarantees would be money spent in carrying on the business. The same considerations apply to class B. When it is worth while to increase the lines which the company retains it is worth while to increase the amount of the investments locally made. They have to balance the advantages of doing more business against the disadvantages of investing money in that particular place and way. The object of the investments being to extend the business, the making of them is part of the business. It is convenient to the company not to remit these dividends to the United Kingdom so long as they can be applied in discharging liabilities out of the United Kingdom, but, the business of the company in its various branches being all one business controlled from this country, before its true financial position can be ascertained in order that

the directors may declare a dividend, all these receipts abroad must be taken into account. I am clearly of opinion, therefore, that they are part of the profits and gains of the trade which the company carry on, and so fall directly within the charging words of s. 2, Sched. D, of the Income Tax Act, 1853. Under these circumstances the surveyor has claimed to assess the company under case 1, and the question is whether he is right in so doing, for if he has assessed it under a wrong case the company is entitled to a decision in its favour. Although in general the scheme of the Act may be to make the several cases mutually exclusive, not only is there no provision that they shall not overlap, but it has been repeatedly recognized that the facts of a given case may cause the subject to be assessable under more cases than one. That is directly recognized in the case of *Colquhoun* v. *Brooks*. (1) Lord Fitzgerald there spoke of "the universal language" of the 2nd section of the Act of 1853; Lord Herschell said that as the respondent resided in the United Kingdom and profits accrued to him from a business carried on elsewhere the words of the statute prima facie supported the contention that he was assessable; and Lord Macnaghten in terms said that "the profits or gains from the respondent's Melbourne business might be held to fall under the 'first case' or under the 'fifth case' if one looked to nothing more than the language of those two cases." The same thing has been recognized in other cases, and in that connection it has been said that where the facts fall under more than one case the Crown has the option to tax under which it pleases. I understand that expression to mean that, if the words of the Act plainly make the subject taxable under either of two cases and he is assessed under one of them, it is no defence to say that he is assessable under the other, and he cannot so far pray in aid the rule of interpretation in favour of the subject as to require that he should be taxed under the case which is least burdensome to himself. Accordingly I do not think that it is a point on which the decision here can turn to say that if the money had been remitted to this country the facts would have clearly fallen within cases 4 or 5. The question is whether they fall within case 1. Reliance has

(1) (1889) 14 App. Cas. 493.

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been placed on behalf of the Crown on a proposition laid down by the Court of Session in their judgment in *Scottish Union and National Insurance Co.* v. *Inland Revenue* (1) with reference to a fire and life insurance company, that "Interest on investments which has not suffered deduction of income tax at its source must be taken into account in ascertaining the assessable amount of profits and gains of the company." It has been urged on the other side that that proposition assumes that the case is one in which the interest could suffer deduction at its source and can therefore have no application to a case like this where the interest could not suffer such deduction. But I do not think that that criticism is sound. I think the Court were referring to all cases in which the investments, for whatever reason, had in fact not suffered deduction at their source.

On the other hand an earlier case, *Smiles* v. *Australasian Mortgage and Agency Co.* (2), which was before the Court in the *Scottish Union Case* (1), was relied on by counsel for the insurance company as being a decision in favour of the proposition that if an insurance company make investments of realized funds in loans on the security of various descriptions of property in the colonies and derive interest from them periodically the interest would fall within case 4, and for the further proposition that because it would fall within case 4 it cannot fall within case 1. As the members of the Court were largely the same, as the interval between the two cases was small, and as the earlier case was cited to the Court in the later, I think it is clear that the Court did not so understand their own decision in the *Australasian Mortgage Company's Case.* (2) The Court there upon the facts of the case came to the conclusion that the interest on the loans was not "interest arising from securities," but was profits of the particular business, which was that of wool brokers. The Lord President speaking of the loans said, "I think this is proper trading and nothing else, and not investment of money upon securities." That decision of fact enabled the Court to say that the case did not fall within case 4 and further that it did fall within case 1. I do not think that the Court there purported to say that if the case fell within case 1 it could not fall

(1) 16 R. 461. (2) 15 R. 872.

within case 4 or vice versa; though Lord Shand appears to have thought that if an insurance company made investments of its realized funds in stocks in the colonies the interest derived from those investments would not fall within case 1. A case, however, was cited to me of *Norwich Union Fire Insurance Co.* v. *Magee* (1), in which the opposite view was taken by a Divisional Court. The case is reported in the *Law Times*, the *Weekly Reporter*, and the Tax Cases, and the accuracy of the report in the *Law Times* has been questioned on the ground that it differs from that in the *Weekly Reporter*. But as in the passage which is material to this case the report is textually the same as that in the Tax Cases, I think it is clear that it represents the actual language used by Wright J., who delivered the judgment of the Court. He there said: "The real point in the case may be put in one sentence. If there is a trade which cannot be carried on without making investments abroad, the interest arising on the investments necessarily made for the purposes of the trade is, as it seems to me, part of the gains of that trade. Constantly it occurs that companies carrying on operations abroad have balances which they leave at interest on foreign securities for a time, or they even provide a reserve fund in foreign securities. In practice the interest on securities of either kind is always brought into account as part of the profits and gains of the business. In the present case I think it clearly appears that the company could not carry on, or could not so profitably carry on, its business in America unless, as the business increased, they provided continually augmenting reserves in these American securities. They do not invest in those investments for the sake of investment, or for the sake of making profit by those investments, but for the sake of having a fund invested in America to answer the requirements of the American law." That judgment, in which Kennedy J. concurred, seems to me to cover precisely classes A and B of the investments in the present case, and I ought to follow it in preference to the opinion of Lord Shand to which I have already referred; moreover it expresses the conclusion at which I have independently arrived upon consideration of the facts and of the language

(1) 73 L. T. 733.

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of the Act. Some doubt may be raised as to whether Wright J. intended to draw a distinction between classes A and B and class C, that of voluntary investments, but I do not think he did except so far as that latter class might consist of investments made solely for investment's sake, for it was with that limited class of voluntary investments that he contrasted the particular investments with which he had to deal. And I think it is clear that the investments which this fire insurance company voluntarily makes abroad are made not merely for investment's sake, but for the sake of having a fund readily realizable abroad to meet the liabilities of their business if need should be. I have therefore come to the conclusion that this appeal fails in respect of all three classes of investment.

*Appeal dismissed.*

Solicitors for appellants: *Sharpe, Pritchard & Co., for Laces & Co., Liverpool.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

J. F. C.

## MONTAGUE *v.* DAVIES, BENACHI & CO.

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*March* 30, 31; *April* 12.

*Sheriff—Fees—Fieri Facias—Liability of Execution Creditor—"Person at whose instance the sale is stopped"—Company being wound up voluntarily—Stay of Execution on Application of Liquidator—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 184, 186, 193—*Sheriffs Act*, 1887 (50 *& 51 Vict. c.* 55), *s.* 20, *sub-s.* 2—*Order as to Fees of August* 31, 1888.

By the Order as to Fees made under s. 20, sub-s. 2, of the Sheriffs Act, 1887, a sheriff may demand, take, and receive certain fees for executing writs of fi. fa., the fees to be levied in every case in which an execution is completed by sale as fees payable to sheriffs were levied before the making of the Order; and "in every case where an execution is withdrawn, satisfied, or stopped, the fees under this Order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be."

After a resolution for the voluntary winding-up of a company certain goods of the company were seized by the sheriff under a writ of fi. fa. in execution of a judgment recovered against the company before the commencement of the winding-up. Upon the application of the liquidator of the company, the Court made an order restraining the execution creditor from selling the goods or further proceeding upon the judgment, and by a subsequent order directed the sheriff to withdraw, but made no order as to payment of the sheriff's fees. In an action by the sheriff against the execution creditor to recover his fees, the latter contended that under the Order as to Fees of August 31, 1888, the liquidator alone was liable as the person at whose instance the sale was stopped:—

*Held*, that the execution creditor, as the person who had issued the execution, and not the liquidator, was liable to pay the sheriff's fees.

The Order as to Fees of August 31, 1888, has merely fixed the scale of fees payable to the sheriff, and has not altered the law as to the liability to pay them.

"The person at whose instance the sale is stopped" refers to the case of the official receiver or trustee in bankruptcy of a judgment debtor who requires the sheriff, under s. 11, sub-s. 1, of the Bankruptcy Act, 1890, to hand over to him the goods taken in execution, and thereby stops the sale.

Appeal from the Liverpool County Court.

The action was brought by the sheriff of Yorkshire to recover 81*l.* 17*s.* for his fees and charges in respect of an execution levied by him upon the instructions of the defendants. The defendants gave the following notice of statutory defence:—"That the defendants are protected from liability by the provisions of

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section 20, sub-sections (2.) and (3.), of the Sheriffs Act, 1887, and by the Order as to Fees made thereunder." (1)

On May 7, 1910, the defendants signed judgment for 2537*l.* 3*s.* 7*d.* and costs against James Sutcliffe & Son, Limited, a company registered under the Companies Acts (hereinafter called the company).

On May 9 a writ of fi. fa. was issued upon the judgment, and forwarded to the plaintiff, who received it on May 10, to execute, and at 2 P.M. on May 11 the plaintiff's officer seized certain goods of the company under the writ. On May 11 at 10 A.M. a resolution was passed at an extraordinary general meeting of the company that the company be wound up voluntarily and that James Dewar Simpson be appointed liquidator for the purpose of the winding-up. (2) Shortly after the execution had been put in the liquidator saw the sheriff's officer, and informed him that he had been appointed liquidator of the company and requested him to withdraw from possession. The sheriff's officer refused to withdraw, and the solicitors to the company wrote to the defendants' solicitors giving them notice of the voluntary winding-up and of the appointment of the liquidator, and requesting them to instruct the sheriff to withdraw forthwith. On May 12 the defendants' solicitors wrote in reply, "We cannot advise our

(1) 50 & 51 Vict. c. 55, s. 20, sub-s. 2: "Any sheriff or officer of a sheriff concerned in the execution of process directed to the sheriff . . . . may demand, take, and receive such fees and poundage as may from time to time be fixed by the Lord Chancellor . . . ."

The Order of August 31, 1888, made by the Lord Chancellor under the above enactment set forth a table of fees relating to the execution of writs of fieri facias, and consisting of eleven items, and at the end there is the following note: "The foregoing fees, numbered 2, 3, 4, 5, 6, 8, 9, 10, 11, shall be levied in every case in which an execution is completed by sale, as fees payable to sheriffs were levied before the making of this Order. In every case where an execution is withdrawn, satisfied, or stopped, the fees under this Order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be . . . ."

(2) It appeared that a petition for the compulsory winding-up of the company had been presented by a creditor on May 4, the hearing of which was fixed for June 17. Notice of this petition was given to the defendants on May 5, but the petition was eventually withdrawn or dismissed, so that it is not necessary to refer to it further.

clients to withdraw from possession unless the amount of the levy is paid. Our clients are secured creditors." The sheriff's officer on May 11 wrote to the defendants informing them of the facts, and adding, "Will you kindly instruct us early to-morrow (Thursday) morning by wire or telephone what further steps I am to take as I am holding possession at your risk, cost, and expense." On May 12 the defendants' solicitors telegraphed to the sheriff's officer to remain in possession, and this was confirmed by a letter of the same date from the defendants' solicitors to the sheriff's officer, adding that "the warrant of execution was lodged with the sheriff prior to the date of the winding-up resolution, and therefore our clients are in the position of secured creditors. You must therefore remain in possession until you are either paid out or receive our further instructions. We note that you are holding at our risk and expense." Thereupon the company's solicitors wrote to the defendants that they would take proceedings to compel the withdrawal of the execution and to stay further proceeding with it, and the defendants' solicitors in reply said that they would resist such proceedings. On May 19 the liquidator took out a summons at chambers in the action on behalf of himself and the company for an order that the defendants, their servants and agents, should be restrained from attempting to sell the goods and effects of the company or in any other way from further proceeding upon or attempting to enforce the said judgment of May 7, and on May 21 Hamilton J., at chambers, upon the company by their liquidator undertaking to abide by any order as to damages, made an order ex parte restraining the defendants, their servants and agents, from selling or removing the goods seized under the execution until after the hearing of the summons or until further order. The summons came on for hearing before Bucknill J. at chambers on May 30, and he made an order continuing the injunction in the terms of the summons. No order was made that the sheriff should withdraw, and the sheriff's officer, though requested to do so by the liquidator, acting upon instructions from the defendants refused to withdraw from possession. A further application was accordingly made to Bucknill J., who on June 6 amended his order of May 30 by making the following addition to it: "And it is further ordered

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that the sheriff do withdraw." The sheriff was not made a party to any of these proceedings, and the learned judge was not asked to make, and he did not in fact make, any order as to payment of his fees and charges. On June 7 the sheriff's officer, upon instructions from the defendants, withdrew from possession.

The defendants having denied liability for the sheriff's fees and charges, the present action was brought.

The county court judge held, upon the authority of *In re Thomas, Ex parte Sheriff of Middlesex* (1), that the liquidator was the person at whose instance the sale was stopped within the meaning of the Order as to Fees made under the Sheriffs Act, 1887, and that therefore he was the person to pay the fees and charges of the sheriff reasonably and properly incurred, and not the defendants; but that the defendants acted unreasonably in directing the sheriff to remain in possession and in resisting the liquidator's application to withdraw after notice that the liquidator intended to apply to the Court to restrain the execution from being further proceeded with, and that therefore the liquidator was not liable for the sheriff's fees and charges after that date. He accordingly gave judgment for the defendants in respect of the claim for the first two days' fees and charges, but that after that the defendants, who directed the sheriff to remain in possession at their risk and expense, were liable, and he accordingly gave judgment against them for the fees and charges properly chargeable after the second day of the execution.

The plaintiff appealed against so much of the judgment as related to the first two days of the execution, and the defendants appealed against the rest of the judgment.

*Holman Gregory, K.C.*, and *Hanbury Aggs*, for the plaintiff. According to the law existing before the Order as to Fees made under the Sheriffs Act, 1887, the defendants, by instructing the sheriff to execute the writ of fi. fa., are liable to pay him his fees and charges. A sheriff is only entitled to demand and take such fees and charges as are allowed by statute, but for

(1) [1899] 1 Q. B. 460.

the recovery of such fees he may maintain assumpsit or debt against the execution creditor: Comyn's Digest, tit. Viscount, F. 1, 2; *Stanton* v. *Suliard* (1); *Woodgate* v. *Knatchbull* (2); *Bullen* v. *Ansley* (3); *Bagot* v. *Malone* (4); *Maybery* v. *Mansfield* (5); and in the more recent case of *Smith* v. *Darlow* (6) it was held that the sheriff is entitled, upon the hearing of an interpleader summons disposing of the merits, to have an order, notwithstanding the failure of the claimant's claim, that the execution creditor, who has put him in motion, shall pay his fees and charges, giving the latter a remedy over against the claimant. That being the law upon the subject, the fees and charges now allowed are fixed and regulated by the Order as to Fees dated August 31, 1888, and made under s. 20, sub-s. 2, of the Sheriffs Act, 1887. By that sub-section a sheriff may demand, take, and receive such fees and poundage as may from time to time be fixed by the Lord Chancellor; and the latter, by the Order of August 31, 1888, fixed a scale of fees accordingly: see the scale set out in the Annual Practice, 1911, vol. 2, p. 295; Yearly Practice, 1911, vol. 2, p. 1753. According to the note at the end of the table of fees, "In every case where an execution is withdrawn, satisfied, or stopped, the fees under this Order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be." That does not affect the liability of the execution creditor. If the sale is stopped and the person at whose instance the sale is stopped is liable to pay the sheriff's fees, then the Order says that he shall pay the fees. If the Order on its true construction modifies the liability of the execution creditor to pay the sheriff's fees, it is ultra vires. Even if the sale can be said to have been "stopped" in the present case, the county court judge was wrong in holding that the liquidator was the person at whose instance the sale was stopped within the meaning of the Order. The Court stopped the sale. If this had been a winding-up by or under the supervision of the Court, the execution would have been void: s. 211 of the Companies

(1) (1599) Cro. Eliz. 654.
(2) (1787) 2 T. R. 148, at p. 158.
(3) (1807) 6 Esp. 111.
(4) (1843) 5 Ir. L. R. 454.
(5) (1846) 9 Q. B. 754.
(6) (1884) 26 Ch. D. 605.

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(Consolidation) Act, 1908. In a voluntary winding-up the execution is not void, but an application may be made by the liquidator to the Court under s. 186, sub-s. (iv.), and s. 193, to stay further proceedings in the execution—*Westbury* v. *Twigg & Co.* (1)—so as to secure an equal division of the assets among the creditors, as is contemplated by s. 186, sub-s. (i.). It is the duty of the liquidator in such a case to bring the facts before the Court, and the Court has then to decide judicially whether or not it will stay the execution. The Court has to exercise its discretion, and the stay is the act of the Court, an order of the Court being necessary. The case is different from that where a receiving order has been made against the execution debtor and the sheriff is bound upon request under s. 11, sub-s. 1, of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), to hand over to the official receiver or trustee in bankruptcy of the execution debtor the goods which he has seized in execution, in which case the official receiver or trustee in bankruptcy is bound to pay the sheriffs' fees: *Trustee of Woolsford's Estate* v. *Levy* (2); *In re Harrison, Ex parte Sheriff of Essex* (3); *In re Thomas, Ex parte Sheriff of Middlesex.* (4) In that case the official receiver or trustee in bankruptcy himself takes the step which stops the sale, and he is the person referred to in the Order as the person at whose instance the sale is stopped. The liquidator here was not the person at whose instance the sale was stopped, and he is not liable to pay the sheriff's fees. The defendants, therefore, as the persons who instructed the sheriff to levy the execution are liable to pay him his fees. The county court judge was wrong in refusing to give the plaintiff his fees and charges for the first two days.

*Greer, K.C.*, and *A. T. Miller*, for the defendants. At common law a sheriff, who is an officer of the Crown, is not entitled to demand or take any fees for levying an execution, and can only take such fees as are allowed by statute: Statute of Westminster the First (3 Edw. 1), c. 26, which is said in 2 Inst. 210 to be made in affirmance of the common law; *Bridge* v. *Cage* (5); *Dew* v. *Parsons* (6), where the authorities are collected in the argument.

(1) [1892] 1 Q. B. 77.
(2) [1892] 1 Q. B. 772.
(3) [1893] 2 Q. B. 111.
(4) [1899] 1 Q. B. 460, at p. 463.
(5) (1605) Cro. Jac. 103.
(6) (1819) 2 B. & A. 562, at pp. 563, 564.

The Act 29 Eliz. c. 4 (repealed by the Sheriffs Act, 1887) allowed the sheriff to take poundage, and in certain circumstances assumpsit or debt lay to recover the amount: *Stanton* v. *Suliard* (1); *Walden* v. *Vessey*. (2) Other Acts, such as 23 Hen. 6, c. 9, and 7 Will. 4 & 1 Vict. c. 55, which have been repealed by the Sheriffs Act, 1887, regulated the fees which sheriffs might demand and take, but none of them gave any right to the sheriff to recover them from the execution creditor. The Order as to Fees made by the Lord Chancellor on August 31, 1888, under s. 20, sub-s. 2, of the Sheriffs Act, 1887, specifies the fees which a sheriff may demand and take in execution of process, and the person who is liable to pay them. The liability to pay the fees and charges is statutory, and the Order must be looked at to see upon whom the liability to pay is cast. Before the Order of 1888 the execution creditor who instructed the sheriff to seize was liable upon an implied undertaking to pay him his fees: *Smith* v. *Darlow*. (3) But merely handing the writ of fi. fa. to the sheriff did not make him liable. The Order now deals specifically with the liability to pay the fees, and the contract implied from the handing of the writ to the sheriff is to pay to the sheriff the fees authorized by the Order. The question therefore is, upon whom is the obligation to pay the fees imposed by the Order? The Order provides that "in every case where an execution is withdrawn, satisfied, or stopped, the fees under this Order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be." Where the execution is withdrawn or satisfied the Order imposes liability on the execution creditor to pay the sheriff's fees, but where the execution is stopped the Order imposes liability on the person at whose instance the sale, or, in other words, the execution, is stopped, and the execution creditor is not liable. The expression "withdrawn" means a voluntary withdrawal, and not a withdrawal under compulsion of an order of the Court. The withdrawal here was not voluntary, but under compulsion of the order at chambers. The defendants are therefore not liable as having withdrawn the execution. Nor are they liable as being

(1) Cro. Eliz. 654. (2) (1626) Latch, 17.
(3) 26 Ch. D. at pp. 611, 612.

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the persons at whose instance the sale was stopped. Stopping the sale is the same as stopping the execution. In the case of a voluntary winding-up of a company the Court acts upon the application of the liquidator. The liquidator in such a case is the person at whose instance the execution was stopped. He is in a similar position to that of the official receiver or trustee in bankruptcy of an execution debtor who stops the sale under the provisions of the Bankruptcy Act, and is liable to pay the sheriff's fees: *In re Thomas, Ex parte Sheriff of Middlesex* (1); *In re Craycraft, Ex parte Browning.* (2) The county court judge was therefore right in holding that the liquidator was liable for the sheriff's fees and charges for the first two days. The judge was, however, wrong in holding the defendants liable for the subsequent fees and charges. In the case of a voluntary winding-up an execution against the goods of the company is not void, as it is under s. 211 where the company is being wound up by or subject to the supervision of the Court, and therefore an execution creditor may properly refuse to withdraw the execution until the Court orders him to do so. It is entirely in the discretion of the Court to say whether the execution shall be allowed to proceed or be stayed, and in the latter case whether the sheriff shall withdraw or remain in possession until further order. The defendants therefore acted reasonably in refusing to withdraw the sheriff until the Court ordered the sheriff to withdraw. If the defendants had voluntarily withdrawn the execution they would have been liable to pay the sheriff's fees and charges. They did not do so, and therefore are not liable to pay any of the fees and charges claimed, the liquidator alone being liable as the person at whose instance the execution was stopped. The defendants' cross-appeal ought to be allowed.

*Holman Gregory, K.C.*, in reply. The defendants upon receiving notice that the liquidator would apply to the Court ought to have directed the sheriff to withdraw. Instead of doing so, they directed him to remain in possession at their cost and expense, and are liable to pay his fees and charges.

*Cur. adv. vult.*

(1) [1899] 1 Q. B. 460, at p. 463. (2) (1878) 8 Ch. D. 596.

April 12. The following judgments were read:—

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PHILLIMORE J. This is an action by the sheriff for his costs and charges of an execution issued by the defendants against the goods of James Sutcliffe & Son, Limited, their execution debtors. The defendants in the county court gave notice of a special defence, the important paragraph of which is No. 2: "That the defendants are protected from liability by the provisions of section 20, sub-sections (2.) and (3.), of the Sheriffs Act, 1887, and by the Order as to Fees made thereunder." They also, as they were entitled to do, defended upon the ground that there was no liability on their part to pay the sheriff these fees.

The defendants had obtained a judgment on May 7, 1910, and issued execution. Under this execution the sheriff seized the goods of the judgment debtors at 2 P.M. on May 11, 1910. In fact, though his officer did not know it, the company had been wound up voluntarily at 10 A.M. that morning. There was also pending a petition for a compulsory winding-up of the company presented on May 4, of which the defendants, the execution creditors, had notice on May 5. The hearing of this petition was fixed for June 17. It was eventually withdrawn or dismissed. Upon the liquidator in the voluntary winding-up learning of the execution he requested the sheriff's officer to withdraw, and upon the latter's refusal requested the execution creditors to withdraw him, and upon their refusal he made in the name of the company and in the action an ex parte application to my brother Hamilton, and procured an interim order on May 21. The matter then came before my brother Bucknill on May 30, upon a summons, and Bucknill J. made an order that the injunction granted on May 21 restraining the execution creditors from attempting to sell the goods or proceeding upon or attempting to enforce the judgment be continued. The liquidator thereupon again called upon the execution creditors to withdraw the sheriff. This they still refused to do. On the contrary, they instructed the sheriff to continue in possession, making statements which render their subsequent line of defence somewhat remarkable. Thereupon further application was made to my brother Bucknill, who on June 6 made an addition to his order which was drawn up in these words: "And it is further ordered that the

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sheriff do withdraw." The execution creditors then by telegram and letter withdrew the sheriff, and as a result of the order of Bucknill J. the execution creditors got no benefit from their execution, which he must have deemed to have been improperly levied. It is in these circumstances that the sheriff sues for his fees.

In the county court counsel for the sheriff rested his case upon the general law (I will explain what I mean by the general law) and the Order made under the Sheriffs Act, 1887, fixing or ascertaining his fees. The counsel for the defendants relied principally, if not wholly, upon the special defence which I have mentioned. As far as I can gather, the argument took the course, and it seems to me the only possible course, of inquiring whether the language of a certain paragraph in the Order made under the Sheriffs Act, 1887, took away from the sheriff the right to his fees which he would by the general law have had. Before proceeding to construe this Order, it is, I think, desirable to see what the general law was before the Sheriffs Act, 1887, was passed and the Order made. By the Statute of Westminster the First, c. 26 (which Lord Coke says (1) was made in affirmance of a fundamental maxim of the common law, though the maxim on which he relies seems to be nothing but a part of the statute in the Latin language), no sheriff nor other the King's officer is to take any reward to do his office, but shall be paid of that which they take of the King (de feodis suis a domino rege sint contenti). Lord Coke says, no doubt rightly, that the statute includes many other officers besides the sheriff; and it may be that the public service in the country was worked upon this principle at the time of Edward I. But in comparatively early stages of our history the practice grew up of allowing public officers to look to fees as part, if not all, of their emoluments. Even the judges, though receiving salaries as part of the King's household, were enabled to supplement their income by fees down to, I think, the nineteenth century. And as time went on the right of the sheriff to demand certain fees was recognized. As far as counsel can assist us the first Act upon this subject is 23 Hen. 6, c. 9. We have also been

(1) 2 Inst. 210.

referred to 29 Eliz. c. 4 and 7 Will. 4 & 1 Vict. c. 55; and counsel for the appellant informed us in the course of the argument that he had referred to the other repealed statutes which are in the schedule to the Sheriffs Act, 1887. There is this remarkable fact in them all except 7 Will. 4 & 1 Vict. c. 55. They all assume a state of things in which the sheriff demanded either personally or by his farmers excessive and extortionate fees, and they do not in positive terms authorize any fees. They only say that no sheriff, under-sheriff, &c., shall exact more than the particular scales which they proceed to mention; and none of them, unless it be the Act of Henry VI., prescribe who is to pay. The Act of 7 Will. 4 & 1 Vict. c. 55, s. 2, does provide that it shall be lawful for sheriffs to take such fees and no more as shall be allowed by the taxing Masters of the Courts of law under the sanction and authority of the judges. But this Act does not provide who is to pay the sheriff's fees. As to the Act of 23 Hen. 6, c. 9, if it imposes any personal liability, it is upon the debtor or other prisoner of the sheriff.

Notwithstanding this, from the time of Elizabeth onwards it has been settled law that the execution creditor who puts the sheriff in motion is liable to the sheriff for his fees. If he withdraws an execution against goods under a fi. fa., or if the goods are not of sufficient value to cover the sheriff's fees and charges, the execution creditor has to bear the loss. If the execution is completed and the results are sufficient, in theory he pays the sheriff and adds his payment to his debt and costs, and takes the total out of the proceeds.

The rule under which this is now done is Order XLII., r. 15, which is substantially a re-enactment of s. 123 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). How much older the rule of law may be I have not inquired. No doubt in practice the sheriff first takes his fees and charges out of the proceeds, and then hands the execution creditor the debt and costs. This is merely a practice of convenience.

Whether the true theory of law be that there was always a contractual relation between the sheriff and the execution creditor, putting the latter and the former in the relation of employer and employed, with this special provision, that the

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sheriff was prohibited from charging for his services, and that, as soon as and as far as this prohibition was removed, it became part of the contract that he should be paid his fees, or whether it be the true theory that the result of the statutes was to create a contract, does not seem to matter. It was decided by the Court of Exchequer Chamber in *Stanton* v. *Suliard* (1) that assumpsit lay by the sheriff against the creditor for his fees, shewing that the relation is or had become one of contract. Other indications that the relation is now that of a contract of employment are to be found in the rules that a sheriff was liable to the creditor for the escape of a debtor taken under a ca. sa., the measure of damages being the debt and costs, and that on the other hand he has a right of indemnity against the execution creditor who directs him to seize the goods which are not the goods of the debtor; and the very word "direction" (which is the right word: see *Smith* v. *Keal* (2)) adds point to this. A most striking instance of the extent of the liability of the execution creditor to the sheriff is to be found in *Smith* v. *Darlow* (3), where Cotton L.J. states the rule to be that the sheriff has a right to say to the person who put him in motion, "pay me the amount of my proper charges."

This being the general law, whether, as I think, common law plus statute law, or statute law only, we get the Sheriffs Act, 1887, which by s. 20, sub-s. 2, provides that a sheriff may demand, take, and receive such fees and poundage as may from time to time be fixed by the Lord Chancellor with the advice and consent of certain judges and with the concurrence of the Treasury, and by sub-s. 3 prohibits his exaction of any other fees. Under this Act the Order in question was made. It establishes a table of fees for executing writs of fieri facias with eleven items. There are two notes or directions, one coming after item No. 3, and the other coming at the end. It is entirely upon this latter note or direction that the defendants' case rests. It is said by the defendants that, as in this case the voluntary liquidator was the person at whose instance the sale was stopped, he is the person ordered to pay these fees, and by consequence the defendants,

(1) Cro. Eliz. 654. (2) (1882) 9 Q. B. D. 340.
(3) 26 Ch. D. 605, at p. 611.

the execution creditors, are not so ordered and may be even said to be relieved.

I would first say that, in my opinion, a man who obtains such an order as was obtained by the liquidator on June 6, 1910, is not a person at whose instance the sale is stopped. The order of June 6, 1910, was carelessly drawn up in language borrowed from the practice in interpleader where the sheriff is a party and can have an order made against him. Here he was not a party, and the only proper construction of the order is that it orders the execution creditors to direct the sheriff to withdraw. But anyhow the sale was not stopped. It may have been stayed for a while under the previous orders. No one ever heard of a sale being stopped with a sheriff left in possession. The position would be intolerable. The sheriff either completes his execution or withdraws, except in the one case where the official receiver or trustee in bankruptcy stops the sale, as Lindley M.R. says in *In re Thomas, Ex parte Sheriff of Middlesex* (1), and then, as that learned judge says, the official receiver or trustee must pay the sheriff his fees. To my mind the disputed paragraph does not make but states or refers to the existing law, and this passage as to stopping the sale refers to the case of the official receiver or trustee intervening. But having read the judgment of my brother Bankes, I desire to avail myself of the further reasons which his close criticism of the language supplies. Any other view of the paragraph would make the order ultra vires, and if intra vires an alteration and not a consolidation of the old law.

The learned judge in the county court decided against the sheriff on principle, and it is from this decision that the primary appeal is brought. However, he gave the sheriff possession money for a large portion of the time, because he was of opinion that the execution creditors had so acted as to make it unreasonable that the liquidator should pay this possession money. I am of opinion that he ought to have decided in favour of the sheriff upon principle, and that the appeal should be allowed; and it becomes unnecessary to consider points raised

(1) [1899] 1 Q. B. at p. 463.

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on the cross-appeal, which must be dismissed. The plaintiff will have the costs here and below, and judgment subject to taxation, if desired.

BANKES J. On May 10, 1910, Messrs. Davies, Benachi & Co. (hereinafter called the execution creditors) delivered a writ of fi. fa. to the sheriff of Yorkshire (hereinafter called the sheriff) to be executed by him by levying upon the goods of a company called James Sutcliffe & Son, Limited (hereinafter called the company), against whom the execution creditors had obtained judgment. The sheriff's officer seized under the said writ on May 11, and he remained in possession till June 6, when he withdrew under the following circumstances. On the day on which the sheriff went into possession a resolution to wind up the company voluntarily was passed. On May 19 a summons was issued at the instance of the company and the voluntary liquidator asking for an order that the execution creditors should be restrained until further order from, inter alia, attempting to sell the said goods and effects of the company, or in any other way further proceeding upon or attempting to enforce the said judgment. On May 21 Hamilton J. made an order restraining any sale or removal of the goods until after the hearing of the summons, which was returnable on May 26, or until further order. On May 30 Bucknill J. continued the injunction in the terms of the summons as hereinbefore set out, and on June 6 he amended his order by directing the sheriff to withdraw. The sheriff was not served with the summons or made a party to the order. As a result of these proceedings of which the sheriff was informed, and as a result also of a request by the voluntary liquidator to the sheriff to withdraw, considerable correspondence took place between the sheriff and the execution creditors, and from that correspondence it is plain that the sheriff was expressly directed by the execution creditors to continue in possession, and that he did so at the "risk, cost, and expense" of the execution creditors, to use the language employed by the sheriff in his letter of May 11, 1910. Bucknill J. was apparently not asked to make any order as to the sheriff's charges or to direct by whom they were to be paid (although the sheriff had called

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attention to the matter by his letter of May 31, 1910), and the order of Bucknill J. is silent on this point.

After he had withdrawn the sheriff applied to the execution creditors for payment of his fees and charges, and on the latter repudiating liability he brought an action for them in the county court of Liverpool. The learned county court judge decided in the sheriff's favour as to part only of his claim, and against this decision both parties have appealed; the sheriff contending by his appeal that the county court judge ought to have decided in his favour as to the whole of his claim, the execution creditors on the other hand by their cross-appeal contending that the decision should have been entirely in their favour. The real question in issue between the parties both before the county court judge and upon the appeal has been as to the proper meaning and effect of the Order as to Fees made under the Sheriffs Act, 1887, the contention for the sheriff being that the Order did not alter the previously existing law as to the person who was liable to the sheriff for the payment of his fees and charges, the contention for the execution creditors on the other hand being that the Order did alter the previously existing law, and prescribed not only the amounts which the sheriff was entitled to charge, but defined the persons from whom alone he was entitled to demand them. The execution creditors further contended that by the terms of the Order the only person liable for the fees and charges was the voluntary liquidator or the company.

During the course of the argument I felt considerable doubt as to the meaning of the language used in the Order, but upon further consideration I have come to the conclusion that the contention of the sheriff is the correct one. I think that the words "as the case may be," occurring in the middle of the passage in the Order which follows item 11, must be read as equivalent to "whichever is liable, as the case may be." So interpreted, the Order is intra vires and intelligible, and the effect of it may be stated thus. The first three items relate to fees up to and including actual seizure. These the Order directs are to be paid by the execution creditor in any event. Items 4 to 11 relate to fees subsequent to seizure. Having fixed what

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the amounts of such fees are to be, the Order goes on to deal with what is to happen in certain events.

A. Where the execution is completed by sale. In this case the Order provides that the fees numbered 2 to 11 (except item 7) shall be levied, that is to say, the sheriff may add them to the debt and levy them if the goods are of sufficient value to enable him to do so.

B. Where the fees cannot be levied because the execution is withdrawn, satisfied, or stopped. In such a case the Order provides that the fees "shall be paid by the person issuing the execution or the person at whose instance the sale is stopped, as the case may be." The construction of these words contended for by the execution creditors was that where an execution was withdrawn or satisfied the person liable to pay the fees was the person issuing the execution, but that where the sale was stopped the person at whose instance the sale was stopped was the only person liable. As stated above, I do not think that this is the right construction. What the draftsman was dealing with was a case where the fees were not leviable and where consequently they would have to be paid by some one; who that some one might be would depend on circumstances. If the case was one where a trustee in bankruptcy had stopped the sale he would be liable under the statute to pay the fees. If the case was one where an order had been made that the sheriff should withdraw or an impending sale be stopped, and as part of the order a direction had been given as to who should bear the sheriff's fees, the person so condemned to pay the fees would be the person to pay. If the case was one in which there was no statutory provision and no order as to who should pay the fees, then the case would be one to which the then existing law as to liability to pay the fees would apply.

So read all that the Order provides is that in a case where the fees are not leviable they must be paid by one or other of two parties "as the case may be," that is to say, according as the one or the other is under the particular circumstances of the case liable to pay them. The present is a case in which I entertain no doubt that under the law as existing at the time the Order was made under the Sheriffs Act the execution creditors are the

persons liable to pay the sheriff's fees; and in my opinion, therefore, the sheriff is entitled to judgment in the action for his entire claim subject to taxation.

For these reasons I think that the appeal of the sheriff must succeed, and the appeal of the execution creditors fail, in each case with costs. In the view I have taken of the case it becomes immaterial to decide what were the precise points argued before the learned county court judge.

*Appeal allowed and cross-appeal dismissed.*

Solicitors for plaintiff: *Bell, Brodrick, & Gray, for R. W. Shoesmith, Halifax.*

Solicitors for defendants: *Burn & Berridge, for Josiah Dean & Son, Liverpool.*

W. F. B.

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*May* 11, 23.

*Practice—Interpleader—Appeal—Issue tried by Master—Master finally disposing of whole Matter—Appeal from Order on Issue—Court to which Appeal lies—Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Rules of the Supreme Court*, 1883, *Order* XL., *rr.* 6, 6A; *Order* LVII., *rr.* 7, 11, 13.

Where an interpleader issue is, under Order LVII., r. 7, ordered to be tried by a Master, and the Master at the trial has made an order determining the issue and finally disposing of the whole matter of the interpleader proceedings, an appeal lies without leave to the Divisional Court from that part of the order which determines the issue.

MOTION to vary the judgment or order of Master Chitty in an interpleader issue tried by him, or in the alternative for a new trial.

The defendant in the issue recovered judgment in the King's Bench Division against one Cunnington for a sum of money, and certain goods were seized by the sheriff in execution under a writ of fi. fa. The goods were claimed by the plaintiff in the issue, and the sheriff took out an interpleader summons, upon which it was ordered that upon payment of 110*l.* into Court by

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the claimant, and upon his giving an undertaking not to remove certain other goods, the sheriff should withdraw, and an issue should be tried before a Master of the High Court as to whether at the time of the seizure by the sheriff the goods seized were the property of the claimant as against the execution creditor, in which issue the claimant was to be plaintiff and the execution creditor defendant.

The issue was tried before Master Chitty, who made the following order :—" In pursuance of the order of reference made in this cause I do find that at the time of the seizure by the sheriff some of the goods seized, namely, the furniture in the house of the value of 36*l.* 15*s.* 0*d.*, were not the property of the claimant as against the execution creditor, but that the residue of the said goods seized were the property of the claimant as against the execution creditor. And I direct that out of the 110*l.* paid into Court there be paid out to the execution creditor 36*l.* 15*s.* 0*d.*, and that the residue of the 110*l.* be paid out to the claimant. I order that there be no action against the sheriff in respect of the seizure, and that the execution creditor do pay the sheriff's costs and charges, and that the execution creditor and claimant do each pay his own costs. I direct that the payment out of Court be stayed for eight days, the claimant continuing his undertaking as to the goods for that time, and if within that time notice of appeal is given the stay be continued until the appeal is heard or further order made herein, the claimant continuing his undertaking for the like time. Liberty to apply." No special leave to appeal was given.

The defendant thereupon served notice of motion before the Divisional Court as above, the variation asked for being that the whole of the money in Court should be ordered to be paid out to the defendant, and that the sheriff should be ordered to proceed with and to complete the execution of the writ of fi. fa. by selling the goods the subject of the undertaking, and that the plaintiff should be ordered to pay to the defendant his costs of and incident to the issue and the trial thereof, including in such costs the sheriff's costs and charges, and that the judgment of the Master upon the trial of the issue so far as the same was in favour of the plaintiff should be set aside and judgment entered

upon the issue in the defendant's favour. Various grounds of law and fact were stated in the notice in support of the motion.

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Upon the motion being called on, the question was raised as to whether an appeal lay, and, if it did lie, whether it lay to the judge at chambers or the Divisional Court.

May 11. *J. B. Matthews*, for the defendant. The Interpleader Act, 1831 (1 & 2 Will. 4, c. 58), enabled a Court of law to give relief by way of interpleader, and by s. 1 the Court or a judge thereof might order an issue to be tried, or with consent might dispose of the matter in a summary manner. By s. 2 the judgment in any such action or issue and the decision of the Court or judge in a summary manner were made final and conclusive. The only way at that time in which an issue could be tried was before a judge with a jury, and upon the certificate of the associate as to the verdict of the jury judgment was entered upon the whole matter of the interpleader by the judge at chambers. Though the judgment so entered at chambers was final and conclusive, the verdict of the jury or the decision of the judge at the trial of the issue could be questioned on appeal as in any other case: *Janes* v. *Whitbread* (1); *Withers* v. *Parker* (2); and no appeal lay from the summary determination of the interpleader proceedings by the judge at chambers: *Shortridge* v. *Young*. (3) Sect. 14 of the Common Law Procedure Act, 1860, gave the Court or a judge power, at the request of either party, to determine the merits of the interpleader proceedings in a summary manner, where from the smallness of the amount in dispute it was thought desirable to do so; and by s. 17 the judgment in any such issue and the decision of the Court or judge in a summary manner were made final and conclusive, and it was held that notwithstanding that section an appeal lay against the findings and judgment upon the issue: *Witt* v. *Parker* (4); *Turner* v. *Bridgett* (5); *Gumm* v. *Tyrie* (6); though no appeal lay from a summary decision under s. 14. All the above provisions except s. 17 of the Common Law Procedure Act, 1860, have been

(1) (1851) 11 C. B. 406.
(2) (1859) 4 H. & N. 810.
(3) (1843) 12 M. & W. 5.
(4) (1877) 46 L. J. (Q.B.) 450.
(5) (1882) 9 Q. B. D. 55, at p. 57.
(6) (1865) 6 B. & S. 298.

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repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), and Order LVII. of the Rules of the Supreme Court, 1883, has now taken their place, and by r. 13 the judge who tries the issue may now finally dispose of the whole matter of the interpleader proceedings. The necessity is thus avoided of going back to chambers after the trial of the issue, and one judgment only is now necessary for disposing of the whole matter, including the issue, but the law still remains that there is an appeal as of right from the findings or judgment upon the trial of the issue, or from some miscarriage at the trial, notwithstanding r. 11 : *Robinson* v. *Tucker* (1); *Dawson* v. *Fox* (2); *McNair & Co.* v. *Audenshaw Paint and Colour Co.* (3); *Coates* v. *Moore.* (4) In *Robinson* v. *Tucker* (5) Brett M.R. seemed to think that an appeal lay by leave from the judgment of the judge finally disposing of the whole matter of the interpleader proceedings. The findings and order of the judge at the trial of the issue are the really important matters, the part of the order finally disposing of the interpleader proceedings being merely formal and depending upon the result of the trial of the issue. When on the other hand the judge at chambers disposes of the interpleader proceedings in a summary manner no appeal lies from his decision : *Waterhouse* v. *Gilbert* (6); *Van Laun & Co.* v. *Baring Brothers & Co.* (7) An appeal therefore lies in this case, and as the Master tried the issue, the appeal is to the Divisional Court, and not to the judge at chambers : *Blair* v. *Clark* (8); *Fraser* v. *Fraser.* (9) In the former case it was held that an appeal lies under Order XL., rr. 6 and 6A, to a Divisional Court from the decision of a Master upon the trial of a garnishee issue under Order XLV., r. 4. Order LVII., r. 7, under which the interpleader issue was ordered to be tried by the Master, is analogous to Order XLV., r. 4, and the appeal lies to the Divisional Court.

*Clayton, K.C.* (*Francke* with him), for the plaintiff. It is submitted that no appeal lies. Order LVII., r. 11, begins by saying

(1) (1884) 14 Q. B. D. 371.
(2) (1885) 14 Q. B. D. 377.
(3) [1891] 2 Q. B. 502, at pp. 505, 506.
(4) [1903] 2 K. B. 140.
(5) 14 Q. B. D. at p. 375.
(6) (1885) 15 Q. B. D. 569.
(7) [1903] 2 K. B. 277.
(8) [1908] 2 K. B. 548.
(9) [1905] 1 K. B. 368.

"Except where otherwise provided by statute." Those words govern the application of the rest of the rule, and therefore the provisions of s. 17 of the Common Law Procedure Act, 1860, are left untouched: *Van Laun & Co.* v. *Baring Brothers & Co.* (1) Sect. 17 provides that "the judgment in any such action or issue as may be directed by the Court or judge in any interpleader proceedings, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them." Under each branch of that section the judgment is final and conclusive, and no appeal lies even with leave. The view of the Divisional Court in *Lyon* v. *Morris* (2) seems to have been that by reason of the provisions of s. 17 of the Common Law Procedure Act, 1860, no appeal lies from the judgment on the issue, and in the Court of Appeal no dissent was expressed from that view. The Master who tried the issue in this case was in the same position as a judge, and he pronounced one judgment, and one judgment only, finally disposing of the whole matter of the interpleader proceedings. No further judgment is required to determine the rights of the parties. Sect. 17 makes that judgment final and conclusive, and no appeal lies.

*J. B. Matthews* in reply.

Pickford J. We think that an appeal lies, and that it lies to this Court, but we desire to put our judgment into writing.

May 23. Pickford J. read the following judgment:—In this case an interpleader issue was directed to be tried before Master Chitty, and an order was made by him after the trial.

The defendant in the issue (the execution creditor) appealed against this order, questioning the Master's decision on various grounds both of law and fact.

The first question which arises is whether there is an appeal against such an order, and, if so, whether such appeal lies to the judge at chambers or to the Divisional Court. I think it has been determined by authority that an appeal lies to the Divisional Court.

(1) [1903] 2 K. B. at p. 282. (2) (1887) 19 Q. B. D. 139, at pp. 144, 146.

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Before the passing of the Judicature Acts interpleader proceedings at common law were governed by the provisions of the Interpleader Act, 1831, and the Common Law Procedure Act, 1860. Under those provisions the judge, if the matter were not disposed of summarily, as could be done under certain circumstances, was empowered to direct an issue to be tried, and by s. 17 of the Common Law Procedure Act, 1860, it was provided that "the judgment in any such action or issue as may be directed by the Court or a judge in any interpleader proceedings, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them."

At that time the only method of trying an issue was by a judge and jury, and after the determination of the issue an order was made by a judge at chambers determining the rights of all parties. There were therefore two stages in the proceedings, the determination of the issue and the final order or judgment. It has been decided by a series of authorities that the judgment referred to in s. 17 of the Common Law Procedure Act, 1860, was the final order or judgment. Against this order there was no appeal, but the finding of the jury on the issue could be questioned on the same grounds as the finding of a jury in any ordinary action, e.g., misdirection or that the verdict was against the weight of evidence.

In 1883 all the existing provisions relating to interpleader were repealed except s. 17 of the Common Law Procedure Act, 1860, and a body of rules contained in Order LVII. of the Rules of the Supreme Court, 1883, enacted in the place of the repealed provisions. Rule 11 provides that "except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a judge in a summary way, under rule 8 of this Order, shall be final and conclusive against the claimants, and all persons claiming under them unless by special leave of the Court or judge, as the case may be, or of the Court of Appeal." Rule 13 provides that the Court or judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings. After the passing of the Judicature Acts it was no

longer necessary that the issue should be tried by a jury. It could be tried by a judge without a jury or in any other manner in which questions in an action could be tried, and for some years it has been the practice in many cases to direct that it should be tried by a Master. Soon after the passing of these Rules the question arose whether there was an appeal from the judgment of a judge who had tried the issue and also disposed of the whole matter under Order LVII., r. 13, and it was decided that there was an appeal against so much of that judgment as was a determination of the issue: *Robinson* v. *Tucker* (1); *Dawson* v. *Fox.* (2) It was explained by Brett M.R. that a judgment given under these circumstances was really a judgment upon two points, first, upon the trial of the issue, and, secondly, upon the rights of the parties as governed by the decision of the issue, and that an appeal lay against it so far as it consisted of a determination of the first point. It was also decided in *Dawson* v. *Fox* (2) that no leave was required for such an appeal. It was stated by Brett M.R. in *Robinson* v. *Tucker* (3) that an appeal would lie against the judgment upon the second point, that is, the judgment settling the rights of the parties, if leave were given. Whether this is in accordance with the reasoning in *Van Laun & Co.* v. *Baring Brothers & Co.* (4) it is not necessary to consider. If therefore this issue had been tried by a judge without a jury, it is clear an appeal to the Court of Appeal would have lain from so much of his judgment as determined the issue.

It is, however, necessary to inquire if the same considerations apply to the trial of an issue by a Master. I think that this is also determined by authority in the case of *Blair* v. *Clark.* (5) In that case an issue had been directed to be tried by a Master in garnishee proceedings. The matter had not been referred to him under the last words of Order XLV., r. 4, but the trial of an issue had been directed, and the provisions as to directing an issue are the same in garnishee as in interpleader proceedings. The plaintiff appealed against the order on general grounds of law and fact, as appears from the notice of appeal in the case which

(1) 14 Q. B. D. 371.
(2) 14 Q. B. D. 377.
(3) 14 Q. B. D. at p. 375.
(4) [1903] 2 K. B. 277.
(5) [1908] 2 K. B. 548.

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I have obtained from the Crown Office, as the grounds of appeal are not stated in the report. The Court (Channell and Sutton JJ.) held that an appeal lay to the Divisional Court. The head-note to the case states that it was decided that an appeal lay under Order XL., r. 6. The appeal in that case did not, however, in terms come within the words of that rule, which begins, "Where at a trial by a referee he has directed that any judgment be entered any party may move," &c. In *Blair* v. *Clark* (1) it was expressly stated that no judgment had been entered: per Channell J. (2); but the Court held on grounds which are not expressly stated that an appeal upon the general grounds stated in the notice lay to the Divisional Court, as in the case of *Fraser* v. *Fraser* (3), decided with respect to a reference to a Master under a different rule. This decision being upon a rule which is the same as Order LVII., r. 7, so far as relates to the trial of an issue, is, I think, an authority which governs this case, and therefore I am of opinion that in this case an appeal lies to the Divisional Court.

LUSH J. I am of the same opinion. We stated, when the arguments were heard, that in our opinion, when an interpleader issue is ordered to be tried by a Master, there is a right of appeal without leave from his judgment or order determining the issue, and that the appeal lies to the Divisional Court. I have read the judgment delivered by my brother Pickford, and I do not desire to add anything to the reasons therein stated for arriving at that conclusion. I cannot help feeling, however, that, in so deciding, we are doing some little violence to the language of Order LVII., r. 11, but the authorities which have been cited appear to me to conclude the matter.

The Court heard the appeal upon the merits and reversed the order of the Master.

*Appeal allowed.*

Solicitors for plaintiff: *Rawle, Johnstone & Co., for Downie & Gadban, Alton.*

Solicitor for defendant: *David Davis.*

(1) [1908] 2 K. B. 548. (2) [1908] 2 K. B. at p. 550.
(3) [1905] 1 K. B. 368.

W. F. B.

[IN THE COURT OF APPEAL.]

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*June* 13.

## NEW FENIX COMPAGNIE ANONYME D'ASSURANCES DE MADRID *v.* GENERAL ACCIDENT, FIRE, AND LIFE ASSURANCE CORPORATION, LIMITED.

*Practice—Costs—Security for Costs—Cross-Action—Plaintiffs in Cross-Action resident out of Jurisdiction—Discretion.*

There is no hard and fast rule of practice which prevents the Court from making an order for security for costs against a person resident out of the jurisdiction who, upon being sued in this country, sets up a cross-claim, either by counter-claim or by cross-action. It is for the Court to consider, in the exercise of its discretion, whether, having regard to the circumstances of the particular case, the cross-claim must be treated as made, substantially, by way of defence to the action against the claimant, or whether it must be regarded as being in the nature of an independent claim made in respect of matters foreign to that action, and therefore one with regard to which security for costs ought to be ordered to be given.

An agreement was made between insurance company A. and insurance company B., which was a foreign company carrying on business out of the jurisdiction, for the reinsurance by the latter company of a certain proportion of fire risks undertaken by the former company in various parts of the world. The agreement provided for quarterly settlements of accounts between the two companies. Such settlements accordingly took place every quarter during a period of four years ending in 1908. Company A. brought an action against company B., alleging that they had been unable to obtain settlements of accounts from company B. in respect of business done in subsequent quarters, and claiming an account in respect of such quarters, and payment of the balance, if any, found to be due to them. Company B. thereupon brought a cross-action against company A., asking for inspection of all original documents and vouchers connected with all transactions in which the plaintiffs were interested under the agreement, that all the previously settled accounts between the two companies should be reopened on the ground of errors having occurred therein, and for an account and payment of any moneys found to be due to them after the said accounts had been reopened and taken:—

*Held*, that an order should be made for security for the costs of the cross-action against company B.

Appeal from an interlocutory order made in an action by A. T. Lawrence J. at chambers as after mentioned.

The above-mentioned action was a cross-action brought under the following circumstances. On June 9, 1910, the General

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Accident, Fire, and Life Assurance Corporation, Limited, the defendants in the above-mentioned action, brought an action against the New Fenix Compagnie Anonyme d'Assurances de Madrid. It appeared, in substance, from the statement of claim in that action, so far as material to this report, that successive agreements were entered into between the plaintiffs and the defendants in that action, the New Fenix Compagnie Anonyme d'Assurances de Madrid, dated respectively November 29, 1904, and October 4, 1907, for the reinsurance by the defendants in that action of certain proportions of risks insured against by policies of fire insurance entered into by the plaintiffs, the General Accident, Fire, and Life Assurance Corporation, on and after October 1, 1904, on the continents of Europe, Asia, Africa, Australia, and America excepting Canada and the United States of America; and that it was provided by those agreements that quarterly accounts should be rendered by the plaintiffs to the defendants, in which the defendants were to be credited with their proportion of the premiums on the policies, and debited with their proportion of the losses, and with commission at the rate of 25 per cent., that the balance appearing on such quarterly accounts should be paid within two weeks after the accounts had been confirmed, and that, for the purpose of checking the losses, the defendants should have a right to inspect all original documents and vouchers. It was further stated in the said statement of claim that, under and in pursuance of the aforesaid agreements, the business between the parties was conducted, accounts were delivered, and, after all due and proper explanations asked and received, balances paid, down to and including the first quarter of 1908, and, by letters dated September 9 and September 15 of that year, the defendants confirmed the account for the second quarter of 1908, shewing a balance payable by the defendants to the plaintiffs of 328*l.* 16*s.* 2*d.*, and that the defendants had not paid the said balance; and, though accounts for subsequent quarters down to the second quarter of 1910, shewing balances in favour of the plaintiffs, were sent to the defendants, and explanations thereof when asked were given, and all documents and vouchers relevant thereto were, as the defendants well knew, open to their inspection, the defendants

had neglected to consider and/or confirm the said accounts. The plaintiffs claimed payment of the before-mentioned balance of 328*l.* 16*s.* 2*d.*, and also of the balances shewn by the before-mentioned quarterly accounts which the defendants had neglected to confirm; and alternatively, if the confirmation of those accounts was a condition precedent to the defendants' liability to pay the balances therein shewn, damages for breach of contract by the defendants in neglecting to confirm the said accounts; and, in the further alternative, the plaintiffs claimed that, if necessary, the said accounts might be taken, and the balances verified, and judgment might be entered for the plaintiffs for the amount found due on such account.

On April 4, 1911, the New Fenix Compagnie Anonyme d'Assurances de Madrid brought the before-mentioned cross-action against the General Accident, Fire, and Life Assurance Corporation, Limited, in which they claimed (1.) an injunction that the defendants do forthwith allow the plaintiffs to inspect all original documents and vouchers connected with all transactions in which the plaintiffs were and are interested under the agreements in writing made between the plaintiffs and defendants, and dated November 29, 1904, and October 4, 1907; (2.) that all accounts between the plaintiffs and the defendants in connection with all transactions under the agreements dated November 29, 1904, and October 4, 1907, be reopened on the ground of errors having occurred; (3.) an account; (4.) an order that the defendants do pay to the plaintiffs any moneys found due to the plaintiffs after the said accounts have been reopened and taken.

The plaintiffs in the cross-action were a foreign company resident and carrying on business out of the jurisdiction. Both actions had been referred to an official referee. The defendants in the cross-action applied at chambers for an order that the plaintiffs in that action should give security for costs, and the Master made an order that they should give 50*l.* security, and that further application, if any, in respect of security for costs should be made to the official referee. On appeal to the judge he reversed the order of the Master on the ground that the cross-action was the equivalent of a cross-bill under the old Chancery practice, and, that being so, the defendants therein were not,

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according to that practice, entitled to an order for security for costs.

*J. R. Atkin, K.C.* (*G. A. Scott* with him), for the defendants in the cross-action. There is nothing to take this case out of the general rule under which a plaintiff resident out of the jurisdiction is ordered to give security for costs. The learned judge at chambers seems to have thought that this case came within the old Chancery practice, by which a defendant out of the jurisdiction bringing a cross-bill in Chancery was not ordered to give security for costs. It is submitted that the true test in such cases is whether the cross-claim set up by the party resident abroad, either by cross-action or counter-claim, as the case may be, is substantially a claim by way of defence to an action, or is an independent claim in respect of matters not involved in that action. Here the original action, in which the present defendants were plaintiffs, was for balances due upon, and for an account in respect of, accounts current between the parties. The plaintiffs in the cross-action are setting up an independent claim to reopen all the settled accounts between the parties, and to obtain discovery and inspection of all documents relating to such accounts in respect of transactions which have taken place all over the world during a period of four years, a proceeding which will involve enormous expense. In these circumstances they ought not to be exempted from the obligation to give security for costs usually imposed upon a plaintiff resident out of the jurisdiction. The present action is not analogous to a cross-bill in equity within the old practice upon which the learned judge acted: see *City of Moscow Gas Co.* v. *International Financial Society*. (1)

*Hemmerde, K.C.*, and *C. Wertheimer*, for the plaintiffs. This action is really a cross-action by way of defence to an action. Under the old system the relief claimed in this action would have formed the subject of a cross-bill in equity. The claim to reopen the settled accounts is matter of equitable relief. There is no distinction for the present purpose between a counter-claim and a cross-action, and the plaintiffs' claim in this action would

(1) (1872) L. R. 7 Ch. 225.

clearly be matter of counter-claim. The plaintiffs were obliged to proceed by way of cross-action, because they could not counterclaim without having discovery of documents in respect of matters not involved in the claim in the action brought by the defendants, which discovery they could not get in that action. It was the old Chancery practice that security for costs was never ordered in the case of a defendant filing a cross-bill in equity: *Mapleson* v. *Masini*. (1) In *Neck* v. *Taylor* (2) Lord Esher laid down the rule now applicable in such cases thus: "Where the counter-claim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is a foreigner resident out of the jurisdiction, the case may be treated as if that person were a plaintiff, and only a plaintiff, and an order for security for costs may be made accordingly, in the absence of anything to the contrary. Where, however, the counter-claim is not in respect of a wholly distinct matter, but arises in respect of the same matter or transaction upon which the claim is founded, the Court will not, merely because the party counterclaiming is resident out of the jurisdiction, order security for costs; it will in that case consider whether the counter-claim is not in substance put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and, if so, what under all the circumstances will be just and fair between the parties." In this case the matters in respect of which the present plaintiffs are claiming in the cross-action arise under the same agreements and out of the same relation between the parties as the matters involved in the defendants' action.

[FLETCHER MOULTON L.J. Is not the question one of discretion depending on the circumstances of the particular case? In *Neck* v. *Taylor* (2) Lord Esher M.R. said that the Court has a discretion to order security for costs, even where the case is one of a counter-claim set up by a defendant resident abroad. A fortiori there would be a discretion in the case of a cross-action so set up. Where, instead of counterclaiming, a person resident abroad chooses to bring a cross-action, in which he is dominus litis, it would seem that he makes it more difficult for

(1) (1879) 5 Q. B. D. 144. (2) [1893] 1 Q. B. 560.

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himself to shew that he ought to be exempted from the obligation to give security for costs. The plaintiffs here could have got discovery as to all matters not included in the settled accounts, which is all they needed for the purposes of their defence to the defendants' action.]

In *Neck* v. *Taylor* (1) the Court refused to order the defendant to give security for costs. The cases appear to shew that the old practice in Chancery was that, in the case of a cross-bill, it was not a matter of discretion, and the plaintiff was never ordered to give security for costs: *Macgregor* v. *Shaw* (2); *Wilkinson* v. *Lewis* (3); *Wild* v. *Murray*. (4) [They also cited *Sykes* v. *Sacerdoti* (5); *Winterfield* v. *Bradnum*. (6)]

*J. R. Atkin, K.C.*, for the defendants, was not called upon to reply.

VAUGHAN WILLIAMS L.J. I think that this case is one of some difficulty. The question whether security for costs should be ordered to be given by a foreigner resident out of the jurisdiction, who is making a claim as plaintiff in a cross-action, or is counterclaiming as defendant in an action, is, I think, a matter of discretion. I wish to say, however, that, in my opinion, it must not be taken that in this case the discretion exercised in the first instance by the Master, who ordered security for costs to be given by the plaintiffs in the cross-action, has been overruled by the judge in the exercise of his discretion. Generally speaking, in a case where the discretion exercised by a Master has been overruled by a judge in the exercise of his discretion, the Court of Appeal does not treat itself as entirely at liberty in dealing with the case on appeal, but prefers the discretion exercised by the judge, unless the judge is very clearly wrong. In this case, if the judge had simply exercised his discretion, I should have felt more doubt than I do whether we could overrule him, the subject-matter with which he dealt being one of discretion. But I do not think that the judge did in this case exercise any discretion. As I

(1) [1893] 1 Q. B. 560.
(2) (1848) 2 De G. & Sm. 360.
(3) (1861) 3 Giff. 394.
(4) (1854) 18 Jur. 892.
(5) (1885) 15 Q. B. D. 423.
(6) (1878) 3 Q. B. D. 324.

understand, he supposed that there was a hard and fast rule of practice which bound him. I have made these observations for the purpose of shewing how, I think, we ought to deal with cases in which we are asked to prefer the discretion originally exercised by the Master to that exercised by the judge at chambers. I will now deal with the question what order ought, under the circumstances, to be made in the present case.

In my judgment, in this matter of ordering security for costs to be given by a foreigner residing out of the jurisdiction, who, either as plaintiff in a cross-action, or as defendant by a counter-claim, is setting up a cross-claim, there is no hard and fast rule as to what the circumstances are under which an order for giving security ought to be made. It may be said generally that, if a defendant resident out of the jurisdiction is simply setting up some claim by way of defence to an action, he ought not to be required to give security. On the other hand it may be taken to be the practice that, if such a defendant is simply bringing a cross-action having nothing to do with the transaction which forms the subject-matter of the claim against him, then the mere fact that he is a defendant in the previous action does not prevent an order being made against him for security for costs. If, in truth and in fact, he is not only a defendant, but is bringing an action which is quite independent of the transaction out of which the claim against him arises, then, generally speaking, he ought to be ordered to give security for costs. It has been suggested that, whenever the cross-claim made by such a defendant goes to any extent whatever beyond mere matter of defence, then, whether he sets up the claim as plaintiff in a cross-action or as defendant by way of counter-claim, he ought to be ordered to give security for costs. I do not agree to that suggestion. It appears to me plain on the cases, such as *Macgregor* v. *Shaw* (1) and *Mapleson* v. *Masini* (2), that there is no such rule as that, where in such cases the cross-claim to any extent whatever overlaps mere defence, security for costs must always be ordered. One must look in each case to see whether in substance the claim set up by a defendant is set up by him by way of defence to the claim against him. I do not say that the true test is that which was

(1) 2 De G. & Sm. 360. (2) 5 Q. B. D. 144.

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suggested in the case of *Wild* v. *Murray* (1), which was cited to us, i.e., that one must ask oneself the question whether the cross-claim would have been set up if the original claim had not been brought, though the learned judge who made that suggestion was a great judge, namely, Wood V.-C., afterwards Lord Hatherley L.C. As I have said, I do not think that there is any hard and fast rule on the subject. We have to consider whether, in substance, upon the facts of the particular case, the defendants in the original action are to such an extent plaintiffs in the cross-action, that they ought according to the general practice in the matter to be ordered to give security for costs, because they have taken up the position of plaintiffs, irrespective of defence to the original action. I think that each case of this kind must be judged on its own merits.

In this case we have plaintiffs in the original action suing in respect of causes of action arising subsequently to the last settlement of accounts between themselves and the defendants, and claiming an account in respect of those causes of action, and payment of any balance found to be due to them. It seems to me that prima facie the claim which the plaintiffs in the cross-action set up for the reopening of all the settled accounts between the parties is a matter outside any defence to the original action. It may be observed that the plaintiffs in the cross-action do not allege fraud as a ground for their action, but merely that there have been a number of mistakes in the settled accounts, which prima facie does not appear to be likely to constitute a good ground for their claim. Taking all these matters into consideration, and dealing with the case, not upon any hard and fast rule, but upon the circumstances of the particular case, I think that the defendants in the original action have converted themselves into plaintiffs by their cross-action in respect of matters foreign to the present relation between the parties. There was a time when, with regard to the matters referred to in the accounts which the plaintiffs in the cross-action seek to reopen, the parties stood towards one another in the relation of insurers and reinsurers, and when, irrespective of any litigation, the plaintiffs in the cross-action had by contract a right to the inspection of documents

(1) 18 Jur. 892.

and vouchers. I think that that relation came to an end on the settlement of those accounts. I do not say that the plaintiffs might not have put forward such a claim as would prevent their being in the position of foreign plaintiffs, if they had alleged fraud as a ground for reopening the accounts; but they have not done so. Under these circumstances I think that, upon the facts of this case, we ought to treat them, not as defendants who are setting up a claim arising out of the same transaction as that out of which an action against them arises, by way of defence to that action, but as plaintiffs bringing an independent action to reopen settled accounts on the ground of mistake. In my opinion the Master's order was right and this appeal must succeed.

FLETCHER MOULTON L.J. I am of the same opinion. The rule that a plaintiff resident out of the jurisdiction should be ordered to give security for costs is a very just one. It would be unfair that the Court should allow its jurisdiction to be invoked by such a plaintiff with a probability that, if the action failed, there might be great difficulty in enforcing any order for payment of costs made against him. I am, therefore, not disposed to narrow the exercise of the jurisdiction to make an order that a foreign plaintiff should give security for costs. It was, however, early seen that it could not be made an absolute rule that such a plaintiff should in all cases give security for costs without doing great injustice, because it might often be necessary for a person resident out of the jurisdiction, who was sued in an English Court, to defend himself by means of a cross-action, by way of counter attack, as, for instance, under the old system before the Judicature Act when it was impossible for a defendant sued for liquidated sums due under a contract to set up by way of defence to the action a claim against the plaintiff for unliquidated damages for breaches of the same contract. The Courts, therefore, have realized that a person who is in point of form in the position of a plaintiff may in reality be a defendant who is only bringing an action in his own defence, and have consequently refused, where a cross-action was merely brought by way of defence, to exercise the jurisdiction to order security for costs. On the other hand there is a countervailing

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danger. If the mere fact that a cross-suit is to some extent defensive were considered conclusive to shew that security for costs should not be ordered, a person outside the jurisdiction, by driving one within the jurisdiction to sue him for some claim, might bring a cross-action which included other matters, and thus put himself in the position of being able to bring an independent action based on claims wholly independent of the original action without giving security for costs. As the matter now stands, it appears to me that neither the fact that the plaintiff in the cross-action is resident out of the jurisdiction, nor the fact that, though he is resident out of the jurisdiction, the action brought by him is to some extent by way of defence to another action brought against him in the English Court, is necessarily decisive as to what ought to be the action of the Court with regard to ordering security for costs. The Court ought to consider the circumstances of the particular case.

The facts of the present case do not leave much doubt in my mind as to what our action here should be. The plaintiffs in the cross-action have stood in the relation of reinsurers to the defendants in the action ever since 1904, and accounts have been presented to them, and settled every quarter, down to the second quarter of 1908. Since then the plaintiffs in the cross-action have refused to settle accounts, and the defendants in that action have accordingly been unable to obtain payment of sums which they allege to be due to them. They, therefore, brought an action claiming an account, and payment of quarterly balances due to them from the second quarter of 1908 down to the second quarter of 1910. The plaintiffs in the cross-action could, as defendants in that action, inquire into all the items included in those accounts, and obtain discovery as to them, but that does not satisfy them. They have brought a separate action, asking for discovery of the documents relating to every transaction between the parties since the commencement of relations between them in 1904, and claiming that the whole of the settled accounts should be reopened and an account taken. Undoubtedly part of their claim in that action is in the nature of defence to the action against them. They are, so far as the unsettled accounts are concerned, claiming as plaintiffs the relief which is claimed by the defendants against

them in the previous action, but there was no need for them to bring a separate action so far as that part of their cross-claim is concerned. They could have counterclaimed that relief in the first action. The reason why they bring a separate action is that they wish to reopen the settled accounts, and they ask for discovery as to the matters of those settled accounts, which would be of a most extensive nature, and would cost a very large sum, because it would relate to the settled transactions of four years. Ought we under these circumstances to say that they should be absolved from the liability to give security for costs, as being plaintiffs resident out of the jurisdiction, because their claim is partly defensive; or ought we to say that they should be ordered to give security, because a part of their claim is in the nature of an independent action? I think that the latter is the right conclusion. That portion of their claim which asks that the settled accounts should be reopened relates to nothing to which the previous action relates, but is an entirely independent action involving most extensive discovery. I do not think that it is right that they should be allowed to bring an action of that kind without giving security for costs. I may add that, although the fact that they have proceeded by way of cross-action is not necessarily conclusive of the matter, I think that, if a party chooses to proceed by way of cross-action, instead of counterclaiming, it increases the burden imposed upon him of shewing that he ought to be excepted from the general rule that a plaintiff residing out of the jurisdiction must give security for costs. But, quite apart from that consideration, I am satisfied that in this case the plaintiffs in the cross-action ought to give security for costs as ordered by the Master, and therefore this appeal should be allowed.

FARWELL L.J. I am of the same opinion. Assuming that the grounds upon which the learned judge at chambers based his decision have been correctly stated to us, the case is of some importance; for, in the first place, he appears to have held that, according to the old Chancery practice, where a cross-bill was filed by a party resident out of the jurisdiction, it was a hard and fast rule that no order for security for costs could be made against

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him, and the Court had no discretion in the matter. In my opinion the whole practice as to ordering security for costs to be given in such cases had its origin in discretion, and the question whether such an order should be made was always a matter of judicial discretion. The earliest case on the subject which I have found is *Meliorucchy* v. *Meliorucchy* (1) in the time of Lord Hardwicke, the report of which states that there was "motion on part of defendant, after applying for time to answer, that the plaintiff, who in his bill charged himself as resident in Florence, should give security to answer costs, and the case of *Glamorgan* v. *Rugby* (2) was cited where his Lordship held it pretty much in discretion of the Court, and might be taken advantage of at any time on the circumstances." Lord Hardwicke said: "If on the face of the bill the plaintiff appears to be beyond sea, as it does here, or if at the time of filing the bill it appears you knew it, you may apply for security to answer costs; but advantage should be taken of it in the first instance before answer, or time prayed to answer: otherwise it is waived. If indeed you are strangers to it, and it comes to your knowledge at any time in the course of the cause, it may be prayed; but here it is waived, it appearing on the face of the bill." The origin of the jurisdiction, so far as I can ascertain, seems to have been that the Court, for the protection of defendants resident within the jurisdiction, took upon itself to say that, if a foreigner chooses to come over here, and take advantage of the jurisdiction of the Court, it is within the discretion of the Court to order him to give security for payment of the costs of the party within the jurisdiction who is sued, in case the action should fail. There was, no doubt, in the Court of Chancery a hard and fast rule as to the amount for which security for costs would be ordered to be given, that amount being at first 40*l.*, which was afterwards increased to 100*l.* Under the Judicature Acts the common law practice prevails, and the amount is discretionary. In *Ogilvie* v. *Herne* (3) an application was made that the plaintiff should give security for costs beyond the usual amount, namely, 40*l.*, on special circumstances. Lord Eldon there said: "I have Lord Hardwicke's

(1) (1750) 2 Ves. Sen. 24.
(2) No reference given to any report of the case.
(3) (1805) 11 Ves. 598.

authority (1) that the Court before his time never acted upon the special circumstances, existing only at the time of the bill filed, in departing from the general rule. I am not aware that since that case the Court has ever departed from it. I think I remember that it has refused to interpose. This is a general rule of great strength: for there is no case in which security for costs has been given where the Court, if acting upon discretion, would not have been justified by the circumstances in saying 40*l.* was much too little." Then, a little further on, he says: "The Court will not require security for costs from any man in England upon any representation of his circumstances: and the rule that has been laid down as to security for costs to be given by plaintiffs abroad is considered as a general rule, applying both to rich and poor." There must, I think, have been some confusion in the mind of the learned judge as to the old Chancery practice, and he must have supposed that there was no discretion as to giving security because, if security was ordered, there was a hard and fast rule as to the amount of such security. That the matter was always one of discretion is borne out by the language of James L.J. in *City of Moscow Gas Co.* v. *International Financial Society* (2), where he said: "But I am disposed to agree with the Master of the Rolls that, whenever a bill is filed in the name of a company which is being wound up, security for costs must be given, whether the bill be a purely cross-bill or not."

Further the learned judge has held that, under the old practice, the claim of the plaintiffs in the cross-action here would have been matter for a cross-bill in equity. But a cross-bill properly so called was merely a supplementary defence: so much so that such a bill was not demurrable for want of equity (Mitford on Pleading, 4th ed., 203; 5th ed., 240), because the equity in the bill sufficed to support the cross-bill also: but this cross-action would have been no true cross-bill, for the equities are quite distinct. Here the plaintiffs in the original action allege that balances are due to them from the defendants in that action upon accounts current between the two companies, and ask for

(1) In *Gage* v. *Lady Stafford*, (1754) 2 Ves. Sen. 556.
(2) L. R. 7 Ch. 225.

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an account, and an order for payment of any balance that may be found due to them. Those would have been good subject-matters of a bill in equity. A cross-bill was a bill by which a defendant in a pending suit set up by way of defence to that suit a claim arising out of the matter to which the claim of the plaintiff in that suit related. But the plaintiffs in the cross-action here set up claims quite distinct from and independent of the matters in question in the original action. They ask to have all the settled accounts between the parties reopened, and this can only be supported on the ground of fraud: if the cross-bill alleged mere mistake, in such a case, it would have been demurrable, being in fact no true cross-bill: if it alleged fraud, it was clearly not the equity alleged in the bill. In my opinion this is not a case in which the cross-action can be regarded for the present purpose as analogous to the old cross-bill in Chancery. According to the present practice, the substance of the case must be looked at. It is not conclusive in such a case, for the purpose of obtaining security for costs, to shew that a party resident out of the jurisdiction brings in by way of counter-claim some matter which to some extent goes beyond defence strictly so called. The substance of his counter-claim must be looked at, and, if it goes so far beyond the subject-matter of the original claim as to constitute in substance a fresh action, which seems to me to be the case here, then an order for security for costs ought to be made against him.

*Appeal allowed.*

Solicitors for plaintiffs: *Guedalla & Jacobson.*
Solicitors for defendants: *Smiles & Co.*

E. L

[IN THE COURT OF APPEAL.]

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## BARKER *v.* HERBERT.

*Nuisance — Highway — Defective Area Railing — Nuisance due to Act of Trespasser—Absence of Knowledge by Occupier of Premises—Duty of Occupier.*

The defendant was the owner in possession of a vacant house in a street, with an area which adjoined the highway. One of the rails of the area railings had been broken away by boys playing football in the street, and, consequently, a gap had been created in the railings. The plaintiff, a child, got through this gap from the street, and was clambering along inside the railings, when he fell into the area, and sustained injuries through the fall. In an action brought on his behalf to recover damages from the defendant in respect of his injuries, the jury found, in answer to questions left to them, that the area was, when the accident happened, a nuisance, but that the defendant did not know, at the time of the accident, that the rail had been removed, that such a time had not elapsed after its removal that he would have known of it at the time of the accident, if he had used reasonable care, and that he had used reasonable care to prevent the premises from becoming dangerous to persons using the highway:—

*Held*, that, upon these findings, the defendant was not liable in respect of the nuisance created upon his premises by the action of trespassers.

*Held*, also, by Fletcher Moulton L.J. and Farwell L.J., and *semble* by Vaughan Williams L.J., that the nuisance could not be regarded as the cause of the plaintiff's injuries, inasmuch as he did not fall through the gap in the railings while using the highway, but got through the gap in order to clamber along inside the railings.

*Cooke* v. *Midland Great Western Railway of Ireland* [1909] A. C. 229, distinguished.

Appeal from the judgment of Lush J. in an action tried by him with a jury.

The action was brought by an infant through his next friend to recover damages for personal injuries occasioned to the plaintiff by falling into an area under the following circumstances:—

The defendant was the owner in possession of a vacant house in a street with an area, which adjoined the highway. One of the rails of the area railings was broken away by boys playing at football in the street on Sunday, May 9, 1909, three days

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before the accident to the plaintiff, who was a little boy between three and four years of age. The case set up for the plaintiff was that he had, while playing in the street, in which he lived, fallen through the gap in the area railings caused by the removal of the rail as before mentioned.

The defendant's case was that he had no knowledge that the rail had been removed before the accident; that he was in the habit of inspecting the premises every week, and he had done so on the Saturday previous to the accident, when there was no rail missing; and that the plaintiff had not fallen through the gap as alleged, but had got through it, and was clambering along a slate ledge on the inside of the railings, and was three or four rails from the gap, when the slate broke, and he fell into the area.

The following questions were left by the learned judge to the jury, and answered by them as follows:—"1. Was the area a nuisance on May 12, 1909?—Yes. 2. If yes, was it so (*a*) by the defendant's default, or (*b*) through a trespasser removing the railing?—(*a*) No. (*b*) Yes. 3. If you find (*b*), did the defendant know the railing was removed at the time of the accident?—No. 4. If he did not, did such time elapse after it was removed that he would have known it by the time of the accident, if he had used reasonable care?—No. 5. Was plaintiff injured by falling through the gap or by clambering along the railings on the house side?—Clambering. 6. Should the defendant, if he had used reasonable care, have anticipated that a child might meet with the accident that the plaintiff met with, if the railing was gone?—No. 7. Did the defendant use reasonable care to prevent the premises becoming dangerous to persons using the highway?—Yes. 8. Damages?—150*l*."

The learned judge upon these findings gave judgment for the defendant, holding that the nuisance could not be regarded as the cause of the injuries to the plaintiff.

*Gantt*, for the plaintiff. The result of the authorities is to shew that the possessor of land that has upon it an artificial excavation, like an area, adjoining the highway, which, if unfenced, would be dangerous to persons using the highway, is under an

absolute obligation at his peril to keep it securely fenced, so as not to constitute a nuisance to the highway. The area having been brought into existence for the benefit of the owner of the premises, it is not unreasonable that he should be under this liability towards the public. The jury have found that, when the accident in this case happened, the area was a nuisance, and it is no defence for the defendant to say that he did not know of its condition. He is, nevertheless, responsible for it as a nuisance. If an owner does not occupy premises which are not let, he ought to employ a caretaker, so that there may be some one on the spot to see that the premises are in repair, and to give him information at once, if anything causes them to be a nuisance: *Harrold* v. *Watney* (1); *Barnes* v. *Ward* (2); *Lawrence* v. *Jenkins* (3); *Tarry* v. *Ashton*. (4) The defendant cannot, as regards a child, rely on the defence that he was trespassing: *Lynch* v. *Nurdin*. (5) Children are given to clambering about, and a gap in the area railings would constitute an irresistible incentive to a child to do what the plaintiff was doing: *Cooke* v. *Midland Great Western Railway of Ireland*. (6) The judge was wrong in holding that the gap in the railings was not the cause of the accident. [He also cited *Reg.* v. *Stephens* (7); *Attorney-General* v. *Tod Heatley*. (8)]

*Morten*, K.C., and *B. Morice*, for the defendant, were not called upon to argue.

VAUGHAN WILLIAMS L.J. I think that this appeal must be dismissed. In this case there was a house with an area fenced off from the street by a railing, and, before the accident in respect of which the action is brought occurred, one of the rails of the area railing had been broken away by boys who were playing football in the street. A little child, whose parents allowed it to be out in the street, came to the point where the railing, which protected persons using the highway from the risk of falling into the area, was broken away, got through the

(1) [1898] 2 Q. B. 320.
(2) (1850) 9 C. B. 392.
(3) (1873) L. R. 8 Q. B. 274.
(4) (1876) 1 Q. B. D. 314.
(5) (1841) 1 Q. B. 29.
(6) [1909] A. C. 229.
(7) (1866) L. R. 1 Q. B. 702.
(8) [1897] 1 Ch. 560.

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gap, and, having done that, tried to go along a sort of parapet, which was on the other side of the railings, and, in so doing, fell into the area, and was injured by the fall. This action was then brought against the defendant, who was the owner in possession of the house, to recover damages in respect of the injuries so occasioned to the plaintiff. [The learned judge then stated the facts in detail, substantially as set out in this report, and the findings of the jury.] On these findings Lush J. gave judgment for the defendant.

The plaintiff's counsel, in opening this appeal, took the only position which, upon these findings, it was possible for him to take. He contended that, where a person possesses premises with an area adjoining the highway, and an accident happens to another person, not by reason of the area not having been originally properly fenced, but by reason of some stranger, a trespasser, having removed a portion of the railings, the possessor of the premises is liable, because there is an absolute duty imposed upon him of such a character as that, if it were a question of contract, it might be said that he warrants to the whole world that there shall be no nuisance on his property adjoining the highway such as to cause danger to any person using the highway; and that, even if the nuisance be caused by an act of trespass on the part of a stranger, not only not done in any way for the benefit of the owner of the premises, but done to his detriment, and therefore presumably against his will, nevertheless he is responsible and must pay damages in respect of the accident, though the nuisance was not caused by him, or his servant, or any of his family, or any one for whose action he is responsible. As I have said, I think that this was the only argument available to the counsel for the plaintiff, because that is the only proposition wide enough to enable him to fix the defendant with responsibility under the circumstances of this case. In my opinion there is no such absolute responsibility as that contended for imposed upon a person who has property adjoining a highway, even although a portion of that property may be an area which, if unprotected by a fence or railing of some sort, would constitute a danger to those using the highway. In my judgment there can be no liability upon the part of the possessor

of land in such a case, unless it is shewn either that he himself, or some person for whose action he is responsible, created that danger which constitutes a nuisance to the highway, or that he has neglected for an undue time after he became, or, if he had used reasonable care, ought to have become, aware of it, to abate or prevent the danger or nuisance. In my opinion it is not the law that there is an absolute duty such as is contended for, where the possessor of the land has neither created the nuisance, nor suffered it to continue.

Cases have been cited to us with regard to the liability of the possessor of land where he knows that there are children who are likely to frequent either the highway, or some property which adjoins his property. Those decisions are mostly concerned with cases in which the gist of the action was negligence, and not nuisance. In the case of *Harrold* v. *Watney* (1) the action was brought on behalf of a child, and appears to have been treated as an action for nuisance. What was said there with reference to the accident having occurred to a child was that, when one is considering the duty of a person whose land abuts on a highway to maintain his fences in such a condition as not to constitute a danger or a nuisance to those using the highway, it ought to be borne in mind that a highway is used by all classes and ages, and therefore it is not sufficient to say that, though the fences were insufficient to prevent mishaps to children, they were sufficient to prevent mishaps to grown up people, if they were reasonably careful. It was in effect held in that case that, the defendant's fence not having been kept in such a condition as not to be dangerous to children using the highway, the defendant was liable. The head-note is as follows: "The defendant was the owner of a fence abutting on a highway. The plaintiff, a child of four years of age, attracted by some boys at play on the other side of the fence, put his foot on it, and it fell on and injured him. In an action of damages for the injuries so sustained, the jury found that the fence was very defective, but actually fell through the plaintiff standing wholly or partly on it, though not for the purpose of climbing over:—Held that, the defective fence being a nuisance, and the cause of the injuries to

(1) [1898] 2 Q. B. 320.

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the plaintiff, the defendant was liable." I do not think that it is necessary for me to read at length the judgment of A. L. Smith L.J. in that case, but he decided it really on the authority of the judgment of Lord Denman C.J. in *Lynch* v. *Nurdin* (1), and partly on the authority of *Jewson* v. *Gatti*. (2) I have said sufficient to indicate what the substance of that decision was, namely, that it was not a defence for the defendant to say that his fence was quite sufficient as regards grown up people, the answer being that the highway was not only for use by grown up people but also for the use of children, and, if there was such a nuisance as constituted a danger to children using the highway, the defendant was liable.

I shall not say anything more with regard to the cases cited where the action was for negligence, like the recent case of *Cooke* v. *Midland Great Western Railway of Ireland* (3), which, being an action of negligence, raised quite different questions from that raised in the present case.

I do not think that it is necessary for me to cite many cases, but there are one or two which I will cite for the purpose of shewing that the law which defines the liability of the possessor of land in cases of this kind has really been settled for many years. I will cite first the case of *Rich* v. *Basterfield*. (4) The marginal note shews the nature of the case. It is as follows: "Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants—such liability attaches only upon parties in actual possession." The responsibility of the possessor of land as defined in that case would appear to be limited to cases where the injury has arisen from the acts of himself, or of his agents or servants, or those persons who, though not his agents or servants, are upon his premises by his permission, and are therefore under his control. The portion of the judgment which deals with the question of his liability not being limited to nuisances occasioned by the acts of his agents or servants is to be found in the following

(1) 1 Q. B. 29.
(2) (1886) 2 Times L. R. 381, 441.
(3) [1909] A. C. 229.
(4) (1847) 4 C. B. 783.

passage in the judgment of Cresswell J. He says: "On the other hand it was contended, that, inasmuch as the fires, which created the smoke complained of, were made, not by the defendant or his servants, but by his tenants, he was not responsible; and that, although in some cases, ex. gr. *Bush* v. *Steinman* (1), *Burgess* v. *Gray* (2), and *Randleson* v. *Murray* (3), the owners of property were held liable for injuries arising from acts done upon that property by persons not strictly their agents or servants, yet such liability attached only upon persons in possession; and that the defendant in this case, not being in possession at the time when the nuisance complained of was created, could not be made liable. And such is now the opinion of the Court." I have cited that case because it appears to me to define the liability of the possessor of land in such cases. The next case which I will cite is *Saxby* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (4) The head-note of that case is as follows: "The defendants were owners of the soil of a stream, which supplied water to two print works. A., whilst occupier of both works, erected a weir across the stream, and thereby diverted the water from one of the works. The plaintiff becoming lessee of the last-mentioned work, and entitled to the water of the stream, removed the weir. A. afterwards, without any authority from the defendants, and against their will, replaced the weir:—Held that the defendants were not responsible for the act of A., or for the continuance of the nuisance." Therefore, in that case, although the defendants knew of the nuisance, they were held not to be responsible for its continuance. Channell B. had ruled at nisi prius that there was no evidence of obstruction by the defendants. A rule nisi for a new trial having been obtained on the ground of misdirection, McIntyre, who shewed cause against the rule, said in argument "no case is to be found where a party has been held liable for an act done by a trespasser on his land against his will." Bovill C.J. in delivering judgment said: "I am of opinion that the ruling of my brother Channell was right, and that there was no evidence which ought

(1) (1799) 1 Bos. & P. 404.
(2) (1845) 1 C. B. 578.
(3) (1838) 8 A. & E. 109.
(4) (1869) L. R. 4 C. P. 198.

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to have been left to the jury. The act complained of was not an act done by the defendants or by any one authorized by them, nor was it an act done for their benefit or adopted by them. On the contrary, we must assume from the correspondence that it was against their will. It has, however, been contended that, the nuisance having been wrongfully created by a stranger, the defendants are responsible for its continuance. There might have been something for the jury, if it had been shewn that the defendants had sanctioned or approved of the act of Welch, or had derived any benefit from it. But nothing of the kind appeared." I need not read the whole of the judgment. Part of the argument for the plaintiff was that the defendants knew of, and ought to have put an end to, the obstruction. What Bovill C.J. said as to that is as follows: "It is suggested that the nuisance being upon land in the possession of the defendants, they could have removed it, and are therefore responsible for its continuance. But the question is whether they were bound to risk the consequences of a personal conflict by doing that which the plaintiff (they assenting) might have done himself. I must confess I do not see why the plaintiff should cast upon the defendants, who have no interest in the matter, a responsibility which he himself declines to incur. I cannot say there was any evidence which could have warranted a verdict for the plaintiff." Byles J., Keating J., and Montague Smith J. delivered judgments to the same effect. The effect of each of the judgments is that, to impose a liability upon the possessor of land in such a case, there must be either the creation of a nuisance by him or a continuance by him of a nuisance.

Now, when one has disposed of the argument that there is such an absolute liability on the part of a person who has land adjoining the highway, that he is liable in such a case, even although he has no knowledge whatever of the existence of the danger, which has not been created by himself or by any person for whose action or omission he is responsible, and there is nothing to justify the imputation to him that he has allowed the danger to continue—when, I say, one has disposed of that argument, there is really nothing left to be dealt with in this case. Even if the authorities on the subject had not been so clear, I think that,

when one comes to look at the findings of the jury, it is obvious that they relieve the defendant from any responsibility for the accident which took place.

There is one other point which I should mention, though it becomes of minor importance under the circumstances, namely, that one of the findings of the jury shews that the accident did not arise, as originally suggested, through the child's falling through the gap in the railings, but through his going along the parapet on the inside of them. I should have thought that point worthy of discussion, had not the case, in my opinion, been so completely disposed of on the grounds which I have already mentioned, but I do not propose to discuss it, though I may say that I think that there is ground at all events for saying that the accident cannot be considered as having been caused by what the jury found to be a nuisance.

*Attorney-General* v. *Tod Heatley* (1) has been cited, and our attention has been called to the judgments in that case. There was one passage in the judgment of Lindley L.J. relied upon by the plaintiff's counsel, where he used the word "prevent." It was sought to apply that to the prevention, not only of nuisances known to the landowner, but also of nuisances unknown to him. I agree that in terms there was no limitation of the application of the word "prevent" as used by Lindley L.J., but, when one looks at the facts of the case, one sees that he was dealing with a case where the defendant not only knew of the existence of the nuisance, but himself set up the defence that, although he knew of it, he had done all that could be expected of him to prevent it. That is clear from a passage in the judgment of Rigby L.J., who says of the defendant, "He has not tried to do anything really practicable to get rid of this nuisance. I cannot imagine that the flimsy sort of hoarding that he has put up and allowed to be pulled down to any extent, is what you might call a serious attempt."

FLETCHER MOULTON L.J. I am of the same opinion. The argument for the plaintiff was based upon the assertion that the law with regard to the liability of the possessor of land adjoining

(1) [1897] 1 Ch. 560.

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a highway in respect of nuisances was of the most severe character. It was contended that such a possessor of land was responsible in respect of a nuisance upon his land, even although it was caused by a trespasser, and he had no knowledge of its existence. It was sought to push this contention so far that, in answer to a question asked by me, it was admitted by the plaintiff's counsel that the doctrine for which he contended would make the possessor of a house responsible, if a burglar broke through the area railings, and left them in a defective state, and some one consequently fell into the area before the owner of the house knew that the damage had been done, or had had any opportunity of repairing it. Vaughan Williams L.J. has so clearly demonstrated that this is not the law by reference to the authorities, that I shall express my opinion with regard to the law of the case briefly, and without express reference to the cases, though it is based on the doctrines laid down therein. We are not dealing in this case with anything analogous to the subject-matter of the decision in *Rylands* v. *Fletcher*.(1) This is not a case where a landowner has erected or brought upon his land something of an unusual nature, which is essentially dangerous in itself. There is nothing unusual or necessarily dangerous in an area protected by railings. In my opinion the law in such a case as the present is that the possessor of land adjoining a highway may not cause his premises to be a nuisance to the highway, and he will be responsible in this respect for the acts of his agents or servants. It may be that, as indicated in certain cases, his responsibility may have a wider range than that, and he may sometimes be responsible for the acts of those whom he permits to be occupants of his premises, but no question arises here as to any such extension of his responsibility, and I only mention the possibility of his being so responsible in order to shew that I have not forgotten it. In a case where the nuisance is created by the act of a trespasser, it is done without the permission of the owner and against his will, and he cannot in any sense be said to have caused the nuisance; but the law recognizes that there may be a continuance by him of the nuisance. In that case the gravamen

(1) (1868) L. R. 3 H. L. 330.

is the continuance of the nuisance, and not the original causing of it. An owner of premises may have a duty to prevent the continuance of the nuisance, but it is obvious that, just as, where the allegation is that he has caused the nuisance, it must be proved that it was there by his act or that of some one for whose action he is responsible, so, where it is alleged that he is responsible for the continuance of the nuisance, it must be proved that it was continued by his permission. He cannot be said to have permitted the continuance of that which was not caused by him, and of which he had no knowledge; and when I say of which he had no knowledge, of course I include the knowledge of the servants and agents for whom he is responsible. If they have knowledge of the nuisance, their knowledge must be attributed to him. I also realize that cases may arise in which his or their want of knowledge may be due to neglect of duty. The findings of the jury, however, put all such considerations out of question in this case. Here the act which caused the nuisance was done by a trespasser, and the nuisance was not permitted to continue by the defendant, because he had no knowledge of it, and the jury have found that this absence of knowledge, and the fact that the damage to the railing was not repaired, were not due to any default on the part of the defendant. On these grounds, therefore, I think that the plaintiff's claim fails entirely.

I do not, however, desire to leave the case there, because the grounds which I have mentioned do not appear to be those on which the learned judge dismissed the action. He acted on another ground, upon which also I think the decision was right. The first finding of the jury is that the condition of the area was such as to constitute a nuisance. That finding was arrived at upon a direction by the learned judge which in my opinion was correct. He said that, if the absence of a rail made it possible for the child to fall through into the area, the jury ought to find that there was a nuisance. A child, though very young, may still be a person lawfully using the highway, and, in so using it, ought not to be exposed to the risk of falling through into the area. When taken with regard to so young a child, this may seem to indicate a very high standard of responsibility on the part of the

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landowner, but, nevertheless, I am not prepared to say that the learned judge's direction was wrong. But here the accident did not arise from the child's falling through the gap caused by the removal of the rail; it arose from his using the gap for the purpose of getting to the back of the railings, and clambering along a ledge at the foot of them. In my opinion the duty imposed upon the landowner is that of fencing a place like this area so as that any one using the highway is not placed in a position of danger, but it is not his duty to maintain a fence of such a nature that a person intending, not to use, but to leave the highway will be thereby prevented from so doing. The duty is to guard against accidents to persons using the highway, and, in order to prevent the existence of a nuisance, the protection afforded must be sufficient as regards children as well as adults. But, if the fencing is such as to prevent risk to persons using the highway, there is no liability on the ground of nuisance, because it is such that a person who wishes to leave the highway can do so, and thereby get into danger. It may be that with regard to children a liability of another kind may under some circumstances arise in cases where there is negligence, but no such liability can be established in the present case having regard to the findings of the jury. The case here was not one in which an accident arose from a person being exposed to danger, while using the highway, by reason of the existence of a nuisance, but one in which a person who was intending to leave the highway was not prevented from so doing by the fence in its then condition. The accident was not due to the nuisance; the existence of that which was a nuisance, namely, an area with a gap in its railings through which the child might have fallen, did not lead to his falling through, but the accident was caused by his taking advantage of the gap to do something which was not using the highway.

FARWELL L.J. I agree. I desire to adopt what has been said, especially by Vaughan Williams L.J., and will only say a few words. The liability sought to be enforced here is a common law liability. The common law is, or ought to be, the common sense of the community crystallized and formulated by our

forefathers. If a proposition of law is put forward by counsel, and that proposition seems to me to be repugnant to common sense, I am disposed to think that the argument is in fault rather than the law. The proposition put forward in this case is in effect that the possessor of land on which there is an excavation by the side of a highway owes to persons using the highway a duty as absolute, to use the illustration employed in *Nichols* v. *Marsland* (1), as that of a man who keeps a tiger. This contention overlooks a fundamental principle applicable to questions with regard to the responsibility of landowners, namely, that there is for this purpose a distinction between the normal and the abnormal user of land. In London and in other towns in England hundreds of thousands of houses are built with areas fenced off from the street by railings. The proposition put forward is that, in the case of such an ordinary user of land, the occupier of the premises is under an absolute obligation at all times and in all possible circumstances, for the argument made no exception even as regards the act of God or the King's enemies, to have and maintain a sufficient fence. In my opinion a landowner is not liable for a nuisance caused, not by his own action, but by something done by another person against his will, subject to the qualification that he may become liable if he permits it to continue and fails to abate it within a reasonable time after it has come, or ought to have come, to his knowledge. Another qualification is that mentioned by Vaughan Williams L.J., which I adopt, namely, that a landowner may be liable, upon the principle of agency, for a nuisance caused by his servant although against his orders, if the servant were acting within the scope of his employment, and for his master's benefit. The same principle applies in the case of an indictment for a nuisance though the owner of the land had no knowledge of it. The authority for that is *Reg.* v. *Stephens.* (2) In that case Mellor J. said in giving judgment: "At the same time it is perfectly clear that the defendant finds the capital, and carries on the business which causes the nuisance, and it is carried on for his benefit; although from age or infirmity the defendant is unable to go to the premises, the business is carried on for

(1) (1875) L. R. 10 Ex. 255, 260. (2) L. R. 1 Q. B. 702.

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him by his sons, or at all events by his agents. Under these circumstances the defendant must necessarily give to his servants or agents all the authority that is incident to the carrying on of the business. It is not because he had at some time or other given directions that it should be carried on so as not to allow the refuse from the works to fall into the river, and desired his servants to provide some other place for depositing it, that, when it has fallen into the river, and has become prejudicial to the public, he can say that he is not liable on an indictment for a nuisance caused by the acts of his servants." Blackburn J. in giving judgment in the same case said: "All that is necessary to say is this, that, where a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right for which an action would lie, if the same nuisance inflicts an injury upon a public right, the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment." Counsel pressed us with the case of *Tarry* v. *Ashton* (1), relying on certain sentences in the judgments delivered by Lush J. and Quain J., but it may be observed that Blackburn J. did not adopt the same language as his brother judges, and bases his judgment on knowledge by the defendant that the lamp was out of repair. It appears to me sufficient to say with regard to that case that it was a case where a heavy lamp had been erected so as to overhang the highway, a proceeding which is not normal in the sense in which a house with a fenced area is normal. The decision may well be supported on the principles stated in this case by Vaughan Williams L.J. and on the grounds given by Blackburn J.

The judgment of Bramwell B. in *Nichols* v. *Marsland* (2) very happily illustrates the view which I take. He says with regard to water stored in an artificial pool, "But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be. Then, why is the defendant liable if some agent over which she has no

(1) 1 Q. B. D. 314. (2) L. R. 10 Ex. 255.

control lets the water out?" Then he takes as another illustration the case of a stack of chimneys, and says, "Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake?" Further on he differentiates such cases from cases like *Rylands* v. *Fletcher* (1) and says, "I am by no means sure that, if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable. But this case, and the case I put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community." It is for the benefit of the community that property should be used in a manner which has been found to be convenient to the public. It would act as a deterrent to building houses in a manner which is usual and has been found by experience to be convenient, if every one who possessed a house with an area protected by railings were subject to such a liability as is contended for in respect of the acts of a trespasser. These considerations dispose of the case.

I only wish to add a word or two as to the case of *Attorney-General* v. *Tod Heatley*. (2) In that case it is clear that the defendant knew of the nuisance, and alleged that he had done all that was reasonably possible for its prevention. The action was not for damages in respect of anything that had happened in the past, but the question was whether the defendant should be restrained from suffering the nuisance to be continued in the future. The case is no authority for the extravagant proposition for which the counsel for the plaintiff has contended.

This case may also be disposed of on another ground, namely, that upon which Lush J. decided it. The gap in the fence cannot be regarded as the cause of the damage, because the jury have found that the plaintiff deliberately got through the railings with the object of clambering along them on the inside. The accident did not happen through the child's falling through the gap, but in consequence of his own act in climbing through it.

(1) L. R. 3 H. L. 330. (2) [1897] 1 Ch. 560.

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Farwell L.J.

This is not one of the cases in which there has been something on land calculated to allure children, and in which it may be said that the owner, knowing the propensities of children, ought to have foreseen that they might be led into danger. Those are cases which depend on negligence and knowledge on the part of the landowner, and here there was neither negligence nor knowledge. On both the grounds which I have mentioned the appeal fails.

*Appeal dismissed.*

Solicitors for plaintiff: *Adams & Colvile.*
Solicitor for defendant: *C. G. Algar.*

E. L.

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*June* 16.

## DOMINION OF CANADA GENERAL TRADING AND INVESTMENT SYNDICATE *v.* BRIGSTOCKE.

*Company—Payment of Commission—Prohibition of—Private Company—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 89.

Sect. 89 of the Companies (Consolidation) Act, 1908, which prohibits (except under the conditions therein specified) the payment by the company of a commission to any person in consideration of his subscribing or procuring subscriptions for shares in the company, applies as well to private as to public companies.

APPEAL from the Westminster County Court.

The action was to recover back the sum of 100*l.* as money which had been paid to the defendant for commission upon the amount of shares in the plaintiff company subscribed for by or through the procurement of the defendant, such payment having been in contravention of the provisions of s. 89 (1) of the Companies (Consolidation) Act, 1908.

(1) By the Companies (Consolidation) Act, 1908, s. 89, sub-s. 1, "It shall be lawful for a company to pay a commission to any person in consideration of his subscribing . . . . for any shares in the company or procuring . . . . subscriptions . . . . for any shares in the company . . . . if the amount or rate per cent. of the commission paid or agreed to be paid is—

"(*a*) In the case of shares offered to the public for subscription disclosed in the prospectus; or

"(*b*) In the case of shares not

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The company was registered on October 13, 1909, as a private company (1), and did not issue either a prospectus, or a statement in lieu of prospectus, or any statement in a form prescribed by the Board of Trade. The defendant took two blocks of 1000 shares each in the company and was appointed a director. He also introduced another person who took seventy-five shares. The shares were 1*l.* shares. In respect of the first block of 1000 shares taken by the defendant commission at the rate of 10 per cent. was paid to a Mr. Hewlings, who introduced the defendant. In respect of the second block of 1000 shares and also of the seventy-five shares commission at the same rate, amounting to 107*l.* 10*s.*, was paid to the defendant. The plaintiffs in their particulars of claim abandoned their claim to 7*l.* 10*s.*, parcel of the commission so paid, in order to bring the claim within the jurisdiction of the county court. The county court judge held that s. 89 did not apply to a private company and gave judgment for the defendant. The plaintiffs appealed.

*Gore-Browne, K.C.*, and *Heber Hart*, for the plaintiffs. As the company did not issue any prospectus or statement in lieu of prospectus or "statement in the prescribed form" (2) in which to

offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar of companies, and where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, also disclosed in that circular or notice."

Sub-s. 2: "Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing . . . . for any shares of the company, or procuring . . . . subscriptions . . . . for any shares in the company."

(1) Sect. 121, sub-s. 1: "For the purposes of this Act the expression 'private company' means a company which by its articles—

"(*a*) restricts the right to transfer its shares; and

"(*b*) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; and

"(*c*) prohibits any invitation to the public to subscribe for any shares or debentures of the company."

(2) Sect. 285: "'Prescribed' means, as respects the provisions of this Act relating to the winding up

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disclose the payment of commission, the payment comes directly within the prohibition in s. 89, sub-s. 2. The words "no company shall apply any of its shares or capital money" apply to all companies whether public or private. Where the Act intends to exclude the application of any of its provisions to a private company it says so in terms. Of this we have illustrations in s. 26, sub-s. 3 (as to the inclusion in the annual summary of an audited balance-sheet), s. 65, sub-s. 10 (as to the filing of the statutory report), s. 72, sub-s. 3 (as to restrictions on the appointment or advertisement of directors), s. 82 (as to filing a statement in lieu of prospectus), s. 85, sub-s. 7 (as to certain restrictions on allotment), s. 87, sub-s. 6 (as to restrictions on the commencement of business), s. 114 (as to the right of holders of preference shares and debentures to inspect the company's balance-sheets), and s. 115 (as to the minimum number of shareholders). But even if s. 89 does not apply to private companies the payment of the commission is equally void as being an ultra vires gift of the capital of the company.

*Clauson, K.C.*, and *Cecil Walsh*, for the defendant. The words "no company" in sub-s. 2 of s. 89 mean "no company other than a private company." The object of requiring the disclosure of the commission is to prevent persons from being entrapped into joining the company under the belief that the assets are larger than they in fact are. But no person can be entrapped into joining a private company, for it is part of the constitution of a private company that it by its articles prohibits any invitation to the public to subscribe for shares. There are now under the Companies (Consolidation) Act, 1908, three classes of companies, (*a*) companies which issue a prospectus, (*b*) those which issue a statement in lieu of prospectus, and (*c*) those which issue a statement in the prescribed form. But a company which in the first instance came within class (*b*) might at a later stage fall within class (*c*), for under s. 82 a statement in lieu of prospectus must be filed with the registrar before the first allotment of shares, and consequently if the company makes a second allotment of shares

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of companies, prescribed by general rules, and as respects the other provisions of this Act, prescribed by the Board of Trade."

it can no longer issue a statement in lieu of prospectus, and instead must make a statement in the prescribed form. Therefore the words "or in a statement in the prescribed form" in s. 89, sub-s. 1 (*b*), are satisfied without supposing them to refer to a private company. Apart from s. 89 there is nothing in the Act making the payment of commission in consideration of subscription for shares an illegal payment.

*Gore-Browne, K.C.*, in reply. Though the shareholders of a private company may not be misled by the non-disclosure of the payment of commissions by the company, it is otherwise with the creditors of the company, and though the number of the shareholders may be under fifty, the number of the creditors of the company may be large.

PHILLIMORE J. I think the county court judge was wrong. I think s. 89 applies to private companies as well as to public companies. But even if it did not I should be of opinion that an action would lie here for money had and received to the use of the plaintiffs by virtue of the general principles governing the formation of limited companies. Payment of such a commission as was given in this case would be illegal unless and in so far only as it may be authorized by s. 89. (1) The provisions of s. 89 were required to enable this payment to be made, and if the section does not apply to a private company, so that the defendant cannot take the benefit of it, the payment was ultra vires and void. There must be judgment for the plaintiffs.

HORRIDGE J. I agree. The action is brought, not for the unpaid balance of shares issued at a discount, but to recover commission paid to a director partly for taking shares himself and partly for procuring another person to take shares. The company was registered as a private company, and it is clear that if s. 89 applies to it the payment to the defendant was prohibited by sub-s. 2, the conditions of sub-s. 1 not having been satisfied. It is said that that section does not apply to a private company. But I think it does. Its language is perfectly general, "Save as aforesaid, no company shall apply," &c. But even if

(1) *Ooregum Gold Mining Company of India* v. *Roper* [1892] A. C. 125.

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it does not, that will not assist the defendant, for without the protection afforded by sub-s. 1 a payment of commission cannot be justified. In either view the payment was illegal and the plaintiffs are entitled to recover the money.

*Appeal allowed.*

Solicitors for defendant: *Gibson & Weldon.*
Solicitor for plaintiffs: *Lewis W. Taylor.*

J. F. C.

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C. A.

1911

*April 7.*

[IN THE COURT OF APPEAL.]

## *In re* A DEBTOR, No. 68 OF 1911.

*Bankruptcy—Provable Debt—Contingent Liability—Costs—Order for New Trial—Costs of First Trial to abide Event of New Trial—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *sub-s.* 3.

An order for a new trial provided that the costs of the first trial should abide the event of the new trial. The plaintiff in the action subsequently became bankrupt, but the bankruptcy was annulled before the new trial took place. The new trial resulted in favour of the defendant, and the plaintiff was ordered to pay the costs of the first trial, which had been taxed, and the costs of the second trial to be taxed. The defendant served on the plaintiff a bankruptcy notice in respect of the costs of the first trial. The plaintiff impeached the validity of the bankruptcy notice on the ground that it related to a debt provable in the late bankruptcy:—

*Held*, that at the date of the bankruptcy the plaintiff was not subject to a contingent liability to pay costs by reason of any obligation incurred before the date of the bankruptcy within s. 37 of the Bankruptcy Act, 1883, and that the objection to the bankruptcy notice failed.

APPEAL from an order of one of the registrars in bankruptcy.

In 1906 the debtor commenced an action against the creditors for wrongful dismissal. In 1908 Phillimore J., after a trial lasting several days, withdrew the case from the jury and entered judgment for the defendants with costs, which were taxed at 900*l.* In April, 1909, the Court of Appeal ordered a new trial and that the costs of the first trial should abide the event of the new trial. In December, 1909, the plaintiff was adjudicated a bankrupt on the petition of another creditor. In June, 1910, a scheme of arrangement was approved by the

Court and the bankruptcy was annulled. The defendants were not parties to this scheme. In November, 1910, the second trial took place before Darling J. and a special jury. The jury found for the defendants, and the learned judge ordered that judgment should be entered for the defendants with costs, and adjudged that the defendants should recover against the plaintiff 900*l.*, the taxed costs of the first trial, and the costs of the second trial to be taxed. Pending the taxation of the costs of the second trial the defendants, in January, 1911, served on the plaintiff, the debtor, a bankruptcy notice in respect of the 900*l.*, the costs of the first trial. The debtor moved to set aside this notice upon the ground that the debt was provable in the late bankruptcy. The registrar was of opinion that that liability was a contingent liability created by the order of the Court of Appeal in April, 1909, and was provable in the late bankruptcy, and he set aside the notice.

The creditors appealed.

*F. Shewell Cooper*, for the appellants. The order of the Court of Appeal directing that the costs of the first trial should abide the event of the second trial did not create a contingent liability within s. 37, sub-s. 3, of the Bankruptcy Act, 1883, and at the date of the bankruptcy there was no liability on the debtor to pay costs by reason of any obligation incurred before the bankruptcy. There was no obligation upon him to pay costs until a verdict and judgment had been given against him in the second trial and the judge had exercised his discretion as to the costs. At the date of the bankruptcy there was nothing but a mere possibility of an obligation, and to convert that possibility into a provable debt a further order was required. The provision as to costs in the order of the Court of Appeal was equivalent to the common provision in interlocutory orders "costs costs in the cause": *In re British Gold Fields of West Africa* (1); *Vint* v. *Hudspith* (2); *Re Bluck.* (3) The objection to the bankruptcy notice therefore fails. [He also referred to *Brotherton* v. *Metropolitan District Railway Joint Committee.* (4)]

(1) [1899] 2 Ch. 7.
(2) (1885) 30 Ch. D. 24.
(3) (1887) 57 L. T. 419.
(4) [1894] 1 Q. B. 666.

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A Debtor, *In re.*

*D. McGarel Hogg*, for the respondent. An order that the costs of the first trial shall abide the event of the new trial is not equivalent to an order upon an interlocutory application that the costs shall be costs in the cause. Under the latter order, where the trial is without a jury, the Court has a general discretion, and, where the trial is with a jury, it has a discretion to deprive the successful party of his costs for good cause shewn; but under the former order the Court has no discretion at all as to the costs of the first action as such. For the same reason the order in this case is not equivalent to an order reserving the costs to the judge. *In re Smith* (1) is in point. There an order was made by consent referring an action to arbitration, the costs to be in the discretion of the arbitrator, and the defendant became bankrupt before the award. It was held that the plaintiff was entitled to prove for the costs given to him by the award. If a man brings an action there is a possibility that he may lose and may have to pay costs, but he has made no contract and is under no order to pay, and that possibility is not a contingent liability within the meaning of the Act; but where there is in existence a contract or an order to pay costs in a certain contingency a liability is created. *In re Smith* (1) is approved by Lindley M.R. in *In re British Gold Fields of West Africa.* (2)

Cozens-Hardy M.R. This is an appeal from an order of the registrar setting aside a bankruptcy notice and it raises rather a curious point. [The Master of the Rolls stated the facts, and continued.] In this state of things the creditors in January of this year served on the debtor a bankruptcy notice based only on the taxed portion of the costs, the 900*l.* which had been taxed under the former order, the costs of the new trial not having yet been taxed. An application was made to set aside that bankruptcy notice on the ground that the 900*l.* was a provable debt in the prior bankruptcy, and if it was a provable debt the objection taken to the present notice was good. In my opinion this was not a provable debt. The distinction between what is and what is not a provable debt was clearly stated by Lindley M.R. in *Vint* v. *Hudspith* (3)

(1) (1886) 3 Morr. 179. (2) [1899] 2 Ch. 7.
(3) 30 Ch. D. 24, 27.

and perhaps even more clearly in *In re British Gold Fields of West Africa*. (1) In *Vint* v. *Hudspith* (2) he says "I doubt very much whether a possibility of having to pay costs is a provable debt. It may in some cases be a 'contingent liability.'" In *In re British Gold Fields of West Africa* (1), which was a considered judgment of the whole Court, he says this: "If an unsuccessful action is brought by a man who becomes bankrupt, then, if he is ordered to pay costs, or if a verdict is given against him before he becomes bankrupt, they are provable: *Ex parte Peacock*. (3) On the other hand, if no verdict is given against him and no order is made for payment of costs until after he becomes bankrupt, they are not provable. In such a case there is no provable debt to which the costs are incident, and there is no liability to pay them by reason of any obligation incurred by the bankrupt before bankruptcy; nor are they a contingent liability to which he can be said to be subject at the date of his bankruptcy."

I ask myself, at the date of the bankruptcy what order was there that the bankrupt should pay these costs? I find none. The order which was made by the Court of Appeal contained these words: "And that the costs of the first trial abide the event of the new trial." That is not an order for payment of costs by the bankrupt. It is not a judgment debt against him at all. Nor do I think that those words are anything more than unnecessary words. The Court of Appeal in ordering a new trial has more than once ordered, as it has power to do, that the costs of the first trial shall be in the discretion of the judge, and then the costs are not costs in the action. But if nothing more is said the costs of the first trial become costs in the new trial and no further order is needed. If Mr. Hogg's contention, which was very carefully and forcibly put before us, is sound, it would involve this startling proposition, that whenever an interlocutory application is made in an action and the judge who hears it makes the costs of it costs in the action, that gives rise to a provable debt. I am not aware of any such decision. There is no order against either party in such a form as that he shall pay the costs. It is

(1) [1899] 2 Ch. 7, 11. (2) 30 Ch. D. 24, 27.
(3) (1873) L. R. 8 Ch. 682.

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just as much a contingency as any other contingency in the action, but it is not a contingency in the sense of being a contingent liability which gives rise to a provable debt within the meaning of the Bankruptcy Act. It may well be that, if the judge in an interlocutory proceeding, instead of making the costs costs in the action, orders that the costs shall be the plaintiff's or the defendant's in any event, that would give rise to a provable debt. I express no opinion upon that. This case seems to me to fall precisely within the observations of Lindley M.R. in *Vint* v. *Hudspith* (1) and *In re British Gold Fields of West Africa.* (2) In my opinion the learned registrar was wrong and this appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. Mr. Hogg's argument fails because it is based on a fundamental misapprehension of the nature and effect of the order of the Court of Appeal. When the application made to it for a new trial was granted the order set aside the verdict and judgment. In other words it put the cause in exactly the same position as if the jury had disagreed and had been discharged without giving a verdict. The trial was abortive. The natural and almost inevitable consequence of this was that the costs of the first trial, like the costs of all necessary and proper steps in the cause, became costs in the cause, and when the Court of Appeal says in a case like this that the costs of the first trial shall abide the result of the second, it is not in my opinion making a new decision, but is stating the consequence of the decision to which it has come in setting aside the verdict and judgment and ordering a new trial, and the result is the same whether those words are put in the order or are left out. It follows that at the date of the bankruptcy this action was simply a pending action and the costs of the first trial were in the same position as the costs of any interlocutory proceeding where the costs are made costs in the cause. That being so, the remarks of Lindley M.R. in *In re British Gold Fields of West Africa* (2) are precisely in point. [The Lord Justice quoted the passage already quoted by the Master of the Rolls.] I entirely agree with that passage, and even if I did not it is

(1) 30 Ch. D. 24. (2) [1899] 2 Ch. 7.

clearly binding on this Court. For these reasons I am of opinion that this appeal should be allowed.

Buckley L.J. Every person who has the misfortune to be a party to pending litigation stands in a position in which he may be ordered to pay costs. Whether that is a possibility or a contingent liability I need not determine. I will assume that it is a contingent liability. Under the Bankruptcy Act, 1883, s. 37, sub-s. 3, the question then is whether the debtor was subject to a contingent liability "by reason of any obligation incurred before the date of the receiving order." I am unable to find here that the debtor was under any obligation at the date of the prior bankruptcy. I agree with what was said by Cave J. in *Re Bluck.* (1) "If a man brings an action he does not place on himself an obligation to pay the costs, that obligation arises when judgment is given against him." An obligation may arise in any one of various ways. It may arise by contract. It will arise if a judge makes an order against him. But in the latter case until judgment there is no obligation. The position of matters here was that the Court of Appeal had made an order that the costs of the first trial should abide the event of the new trial. In my judgment that order has just the same effect as the order which is made every day in interlocutory proceedings that the costs of a motion shall be costs in the action. There is no order to pay costs. There is an order that it shall be remitted to a tribunal subsequently to determine whether the costs shall or shall not be paid. That is not an obligation. There was here no binding obligation which could give rise to a provable debt. In my opinion this bankruptcy notice is good and this appeal ought to be allowed.

*Appeal allowed.*

Solicitors for appellants: *Worthington Evans, Dauney & Co.*
Solicitor for respondent: *Harry Coulson.*

(1) 57 L. T. 419.

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*May* 5, 12.

[IN THE COURT OF APPEAL.]

## *In re* SUNDERLAND.

*Bankruptcy—Petition—Conduct of Petitioning Creditor—Assignment for Benefit of Creditors — Assent — Secret Arrangement — Extortion — "Sufficient Cause" for Refusal of Receiving Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 3.

The debtor, at a time when he was hopelessly insolvent and was about to call a meeting of his creditors, took delivery on credit of goods of considerable value from the petitioning creditors. At the meeting the petitioning creditors refused to assent to an assignment for the benefit of creditors, unless the goods were returned to them or their value allowed; but, after a resolution for an assignment had been passed, they took part in the nomination of the committee of inspection. On receiving a form of assent to the assignment they telephoned to the accountant who had charge of the debtor's affairs repeating their demand for a return of the goods or payment of their value under a threat of legal proceedings. On the refusal of their demand they commenced an action in the King's Bench Division against the debtor for goods sold and delivered and obtained final judgment against him, and, on his failure to comply with a bankruptcy notice issued in respect of that judgment, filed a petition in bankruptcy against him founded on his non-compliance with the bankruptcy notice:—

*Held*, that the petitioning creditors had not either by any improper conduct or by any assent to the assignment precluded themselves from taking proceedings in bankruptcy, and that "sufficient cause" within s. 7, sub-s. 3, of the Bankruptcy Act, 1883, had not been shewn why a receiving order should not be made.

*Re Shaw*, (1901) 83 L. T. 754, explained and distinguished.

*Per* Cozens-Hardy M.R. and Kennedy L.J.: *Semble* the petitioning creditors could not have relied upon the execution of the assignment as an act of bankruptcy.

Appeal from a decision of a Divisional Court (Phillimore and Horridge JJ.). The question raised by the appeal was whether there was sufficient cause within s. 7, sub-s. 3, of the Bankruptcy Act, 1883, why a receiving order should not be made against the debtor.

On Friday, September 2, 1910, the debtor, who was largely indebted to the petitioning creditors, took delivery of some yarn supplied by them on credit of the value of 60*l*. At that date the debtor was hopelessly insolvent, and on the following day, after consulting Nuttall, an accountant, he sent out circulars to

his creditors for a meeting to be held on Wednesday, September 7. On the morning of the Wednesday, before the time fixed for the meeting, two representatives of the petitioning creditors (who were a limited company), Helliwell and Pickles, called on the debtor, and Helliwell demanded a return of the goods. The debtor referred them to Nuttall, and Helliwell repeated his demand to Nuttall. Nuttall said that as they were within two hours of the meeting it was impossible to do any such thing. Helliwell said that nothing need be said about it, but Nuttall refused his demand. Both Helliwell and Pickles attended the meeting. Helliwell made a speech in which he stated that he thought it was a fraud upon his company for the debtor to take the goods in at that stage, and he demanded the return of the goods or payment in full. The creditors, however, took the view that the goods should be treated as part of the general assets. Ultimately it was proposed that the debtor be requested to execute a deed of assignment for the benefit of his creditors and that a committee of inspection be appointed. This resolution was carried by a majority. Helliwell voted against the resolution or at least abstained from voting for it. The chairman, Finlinson, who represented the Halifax and Huddersfield Union Bank, the largest creditors, and who objected to the resolution on a ground not material to be stated, threatened to file a petition in bankruptcy against the debtor and withdrew from the meeting. The meeting then nominated three persons to act on the committee, including a representative of the petitioning creditors, and the motion for their appointment was carried. Helliwell voted for the motion and said that Pickles would represent his company. The bank did not in fact take proceedings in bankruptcy against the debtor. On the following Friday, September 9, after the petitioning creditors had received a form of assent to the deed of assignment for their signature, a representative of theirs telephoned to Nuttall asking him to return the goods or allow their value, and threatened if he did not comply with this request to issue a writ against the debtor. On Nuttall's refusal, the petitioning creditors commenced an action in the King's Bench Division against the debtor, and on September 22 they obtained final judgment against him in default of defence for 313*l.* 5*s.* for

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goods sold and delivered. On September 23 they served on the debtor a bankruptcy notice which was not complied with. On October 3 they presented a bankruptcy petition against him in the Halifax County Court, the act of bankruptcy alleged being the non-compliance with the bankruptcy notice, and on November 3 a receiving order was made by the registrar.

The debtor appealed on the grounds (1.) that the petitioning creditors through their representative must be taken to have assented to the deed of assignment; (2.) that they had attempted to obtain an unfair advantage against the other creditors.

The Divisional Court, without expressing any concluded opinion on the first point, though they inclined to the view that there was no assent, held, on the authority of *Re Shaw* (1) and *Re a Debtor* (2), that the petitioning creditors had precluded themselves by their conduct from obtaining a receiving order, and that there was sufficient cause within s. 7, sub-s. 3, of the Bankruptcy Act why the order should not be made. They therefore allowed the appeal.

The petitioning creditors appealed.

*Hansell*, for the appellants. The decision of the Divisional Court that the receiving order was wrongly made on the ground that the appellants had attempted to gain an undue advantage over the other creditors is not warranted by the authorities. The cases establish that if a creditor goes behind the back of the other creditors and attempts as the price of his coming in under an assignment to induce the debtor to grant him better terms than the other creditors he is precluded from instituting bankruptcy proceedings against the debtor, but they do not go beyond that. It may be that the action of the appellants' representative at the creditors' meeting might debar them from relying on the deed of assignment as an act of bankruptcy, but they have done nothing to debar them from taking bankruptcy proceedings upon an independent act of bankruptcy. There was here no secret arrangement; there was no secrecy, and no arrangement was come to. The Divisional Court misapprehended

(1) 83 L. T. 754. (2) (1904) 91 L. T. 664.

the effect of *Re Shaw* (1) and *Re a Debtor*. (2) In both those cases an attempt was made to come to a secret arrangement with the debtor whereby the petitioning creditor would get an undue advantage and the proposed transaction was a fraud on the other creditors.

[BUCKLEY L.J. referred to *In re Otway*. (3)

KENNEDY L.J. referred to *In re Blythe*. (4)]

Fraud here is out of the question, and there was no extortion. Nothing short of demanding something beyond what the creditor is entitled to can amount to extortion. It is not extortion to say "Pay me what you owe me"; it is only extortion to say "Pay me what you owe me plus something else." The appellants owed no duty to the other creditors except to be honest and above board, as they were.

[BUCKLEY L.J. referred to *In re Bebro*. (5)]

*Tindal Atkinson*, and *Alan Macpherson*, for the respondent. There was here an attempt by the appellants to gain an unfair advantage over the other creditors. When the appellants made their original demand for a return of the goods they suggested secrecy. Then after the meeting of the creditors they repeated their demand to Nuttall under a threat of bankruptcy proceedings. That was an abuse of the process of the Court. If the demand had been acceded to the appellants would have come in under the deed with an unfair advantage, and that would have been a fraud on the other creditors; and the fact that the attempt was unsuccessful makes no difference. The appellants by their conduct at the meeting misled the other creditors into believing that they were willing to come in under the deed on equal terms, and in that respect this is a stronger case than the cases relied on by the Divisional Court, because in those cases there was no pretence of any assent to the deed. Further, the evidence establishes that the appellants assented to the deed, and on that ground also the appeal fails. Assent is equivalent to execution. But assuming that there was here no assent equivalent

(1) (1900) 83 L. T. 487; on appeal, (1901) ibid. 754.

(2) 91 L. T. 664; on appeal, sub nom. *In re Goldberg*, 21 Times L. R. 139.

(3) [1895] 1 Q.B. 812.

(4) (1881) 17 Ch. D. 480.

(5) [1900] 2 Q. B. 316.

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to execution, at any rate the appellants by the attitude which their representative took up at the meeting induced the belief that they accepted the principle of the deed, and that amounts to estoppel by conduct: *Re Sedgwick.* (1)

*Hansell* in reply. As to assent, *In re Mills* (2) is an answer to the respondent's contention, and the only effect of what the appellants did was to prevent them from using the deed as an act of bankruptcy. As to estoppel, there is nothing in the evidence which suggests that the creditors were misled by the appellants' conduct.

*Cur. adv. vult.*

May 12. COZENS-HARDY M.R. On September 22, 1910, the petitioning creditors obtained final judgment for 313*l.* 5*s.* against the debtor for goods sold and delivered. On the following day they served a bankruptcy notice which was not complied with. On October 3 they presented a bankruptcy petition, the act of bankruptcy alleged being non-compliance with the bankruptcy notice. On November 3 a receiving order was made. The Divisional Court rescinded the receiving order and dismissed the petition on the ground that "sufficient cause" had been shewn why no order should be made on the petition: s. 7, sub-s. 3, of the Bankruptcy Act.

It is not alleged that there is any defect in the proceedings to which I have referred. But it is contended that by reason of what took place antecedent to the judgment "sufficient cause" is made out. At the beginning of September the debtor was to his own knowledge insolvent. He took delivery of some goods, which the petitioning creditors supplied on credit, almost immediately before his creditors were called together. The petitioning creditors not unnaturally took the view that this was fraudulent on the part of the debtor, and they demanded the return of the goods or their value. This contention was made openly at the preliminary meeting of the creditors, and through their representative they declined to vote in favour of an assignment unless their demand was complied with. The creditors present did not agree to this. By a majority it was resolved that the debtor should be requested to execute an

(1) (1888) 60 L. T. 9; 5 Morr. 262. (2) [1906] 1 K. B. 389.

assignment for the benefit of his creditors. A deed was subsequently prepared and executed by the debtor. The petitioning creditors declined to execute it, and I am clearly of opinion that they did not assent to it in such manner as to be bound by it. I should mention that, after the resolution for a deed of assignment and for the appointment of a committee of inspection had been passed, the representative of the petitioning creditors suggested the name of a person as a member of the committee. Now in my opinion there is not a trace of fraud or extortion in this transaction. There was no secrecy. Everything was open and above board. They declined to come into the assignment unless they got what they considered their due. They did not pretend to come in and then seek some secret advantage. The suggestion of extortion is absurd. A creditor is entitled to use legal process to enforce payment of his just debt; and none the less if he knows that his debtor is in pecuniary difficulties and unable to pay all his creditors. The issue of the writ and the signing of the judgment were legitimate steps. In saying this, I am not overlooking the undeniable fact that the jurisdiction in bankruptcy is discretionary. It may be, and upon the whole I think it is, correct to say that the petitioning creditors could not have relied upon the execution of the assignment as an act of bankruptcy, they having been in some sense privy to it. But they are relying upon a subsequent and independent act of bankruptcy, and it would be wrong to hold that their conduct in connection with the assignment prevented them for all time from presenting a petition in respect of their debt. The case of *In re Mills* (1) is a clear authority on this point. The learned judges in the Divisional Court thought this case fell within the principle of *Re Shaw* (2) and *Re a Debtor* (3), but, with great respect, I am unable to assent to this view. There is neither fraud nor extortion, either accomplished or intended, and I think there is no "sufficient cause" why a receiving order should not be made.

In my opinion the appeal should be allowed and the order of the registrar restored.

(1) [1906] 1 K. B. 389. (2) 83 L. T. 754.
(3) 91 L. T. 664.

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BUCKLEY L.J. The question for decision is whether within s. 7, sub-s. 3, of the Bankruptcy Act sufficient cause has been shewn why no order should be made on the petition of these creditors. In my opinion no sufficient cause has been shewn. A creditor who knows that his debtor is in difficulties is none the less entitled to bring his action, obtain judgment, issue execution, and enjoy the fruits of it (unless he be intercepted by bankruptcy proceedings), and none the less because the result may be that he will obtain payment in full and other creditors will not. This is his legal right. The Court sees in it nothing in any way improper. Similarly it seems to me that a creditor who has threatened his debtor with consequences if he does not pay his debt and threatens or takes any legitimate steps for enforcing payment is none the less entitled, if his demands are not satisfied, to proceed in bankruptcy. On the other hand the Court does not allow the bankruptcy jurisdiction to be invoked for purposes of fraud or extortion. The principle is best stated, I think, in the words of Rigby L.J. in *Re Shaw* (1): "To use or even attempt to use bankruptcy proceedings for the purposes of fraud or extortion although the attempt may fail is a sufficient cause for refusing on the petition of that creditor to make a receiving order. . . . . A debt which has been used as a means of extortion cannot afterwards be made use of as a means of getting a receiving order." The decision in *Re Shaw* (1) seems to me to have been misunderstood. There had been a resolution to accept a composition, a creditor subsequently called on the debtor and offered to assent to the composition if the debtor would give him in addition to the amount coming to him under the composition a promissory note for the balance of his debt. He proposed an arrangement secret between himself and the debtor by which he should pretend to accept the composition and at the same time get more than the composition. He proposed to the debtor to be party to a fraud. The Court held that in respect of the particular act of bankruptcy on which the creditor was relying the creditor was under disability to take bankruptcy proceedings. *Re a Debtor* (2) is a like case. The reasons given in the Court of Appeal do not appear. The facts

(1) 83 L. T. 754. (2) 91 L. T. 664; affirmed 21 Times L. R. 139.

were similar to those in *Re Shaw*. (1) The petitioning creditors had been ready to assent to the deed of assignment if they received in addition to the amount coming to them under the deed a further sum of 60*l*. In both these cases the petitioning creditors were persons who were seeking to defraud the other creditors by pretending to share equally with them when in fact they were getting more than they did. They were practising a fraud. Similarly, in Rigby L.J.'s words, they would have been precluded from proceeding in bankruptcy if they had practised extortion. It is not, however, extortion to demand payment of what is due and to enforce by legitimate means payment of what is due. Neither is it extortion to make openly a claim which cannot be supported in law and to decline to assent to a deed of assignment when the claim is not admitted.

Upon the facts of this case there was no secret arrangement. The attempt to make an arrangement was public, not secret. The petitioning creditors at the meeting made publicly their complaint of the injustice which they asserted had been done to them and of the terms which they thought would be fair. The other creditors did not assent. The resolution in favour of the deed was passed in that position of affairs, and no creditor was induced to vote for it by any pretence on the part of the petitioning creditors that they were going to assent. They openly stated that they would not. After the resolution had been passed and a resolution for the appointment of a committee of inspection had been passed, and after the representative of the bank had left the chair, it is true that the petitioning creditors did take part in the matter of the nomination of the persons who should serve on the committee of inspection. But there was no conduct on their part which amounted to an assent to the deed. Upon this it is sufficient to refer to *In re Mills*. (2) In my judgment the petitioning creditors have not either by any improper conduct or by any action of assent to the deed precluded themselves from applying to the Court in Bankruptcy to give them relief in respect of their debt. In my judgment the receiving order which was made in the county court was right and this appeal should be allowed and the order restored.

(1) 83 L. T. 754. (2) [1906] 1 K. B. 389.

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KENNEDY L.J. In this case I take the facts to have been as they appear in the judgment of Phillimore J. in the Divisional Court in which Horridge J. concurred.

The result as to material points, as I understand them, appears to me to be as follows :—

1. The appellants never placed themselves in the position of a creditor who assented to a deed of arrangement.

2. The effect of their conduct at the meeting was, in the words of Vaughan Williams L.J. in *In re Mills* (1), to "make them privies to the execution of the deed in this sense—that they could not afterwards use the execution of the deed as an act of bankruptcy upon which to found a bankruptcy petition against the debtor."

3. On September 9, after the appellants had received the circular with the form of assent for signature, they by their solicitor, on the telephone, asked the debtor's accountant if they could have the goods in question back or have their value, and threatened that, if this request was not complied with, they would issue a writ. Having regard to the fact that before the meeting of the creditors one of the appellants' representatives had made a like demand and suggested secrecy, and that the document for their written assent to the deed of arrangement had been at this time placed before them for signature, I can only draw the inference which was drawn by the learned judges in the Divisional Court that the appellants were improperly trying to get an advantage over the debtor's other creditors by an express threat of legal proceedings if their suggestion was refused, and an implied offer to sign the deed if it was complied with. It does not appear to me that this attempt of the appellants was at all less improper because their demand for the return of these goods had been openly made at the meeting of creditors and then disallowed. The facts are not in dispute. They appear in the evidence of witnesses called before the registrar at the hearing of the petition where the petitioners were represented and they did not offer any evidence in contradiction.

4. The petitioning creditors successfully sued the debtor to judgment in an action to which no defence was offered and duly served upon the debtor a bankruptcy notice the non-compliance

(1) [1906] 1 K. B. at p. 391.

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with which was the act of bankruptcy upon which the petitioning creditors based their claim against the debtor for an adjudication of bankruptcy.

This being, as it seems to me, a correct summary of the material facts, what was the legal position of the parties which resulted therefrom, in regard to the right of the petitioning creditors to have the debtor adjudicated bankrupt?

The Divisional Court has found a sufficient ground in the conduct of the petitioning creditors for reversing the order for adjudication made by the registrar of the Halifax County Court, and this judgment of the Court is based by both the learned judges who composed the Court upon the decisions in *Re Shaw* (1) and *Re a Debtor*. (2) I am unable to take the same view. If the act of bankruptcy upon which the petitioning creditors proceeded had been the admission of insolvency which led to the debtor calling his creditors together, or upon the assignment contained in the deed of arrangement, I do not think that I should have dissented from the judgment of the Divisional Court. But this was not the case. The foundation of the petitioning creditors' petition was non-compliance with the notice to pay the amount of the judgment in the High Court obtained against the debtor in the action which was afterwards commenced by the petitioning creditors; and therefore I think that the two cases upon the authority of which the decision in the Divisional Court was given do not apply. In each of those cases the petitioning creditor based his petition upon the allegation of an act of bankruptcy committed by the debtor in the course of the very transaction in which the petitioning creditor himself had acted unfairly: in the first case, upon the fact of the debtor having given notice to creditors of his inability to pay his debts, which led to the negotiations in the course of which the petitioning creditor had tried improperly to get a preference for himself; and in the second case, upon the execution of the deed of assignment, in regard to which the petitioning creditor had tried, by the threat of bankruptcy proceedings, to extort a similar preference. In *Re Shaw* (1) both Rigby L.J. and Vaughan Williams L.J. laid stress upon the fact that the act of bankruptcy put forward by

(1) 83 L. T. 754. (2) 91 L. T. 664; 53 W. R. 223.

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the petitioning creditor was an act which formed part of the very proceedings in which the petitioning creditor had acted improperly. Here the appellants do not rely at all upon the proceedings which led up to or accompanied the deed of arrangement. The act of bankruptcy upon which this petition was based is an entirely distinct and subsequent transaction, arising out of the judgment against the debtor which was regularly obtained in the High Court, and the non-compliance with the bankruptcy notice following that judgment. In my opinion the cases cited do not apply; and the judgment of this Court in *In re Mills* (1) affords clear authority that we ought not to hold that the petitioning creditors' right to an adjudication of the debtor on this subsequent and independent act of bankruptcy is impaired by the fact, as I hold it to be, that in the earlier proceedings in regard to the deed of assignment the petitioners so acted that they ought not, had they sought to do so, to have been permitted to obtain an adjudication upon an act of bankruptcy committed in the course of those proceedings and in immediate connection with them.

*Appeal allowed.*

Solicitors for appellants: *Ward, Bowie & Co., for Walter & E. H. Foster, Leeds.*

Solicitors for respondent: *Robbins & Co., for Longbotham & Sons, Halifax.*

(1) [1906] 1 K. B. 389.

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## THE KING *v.* DAVIES AND OTHERS.

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*Jan.* 31;
*Feb.* 1.

*Vestry Clerk — Duties — Registration of Voters — Returns as to Inhabitant Occupiers of Dwelling-houses — Expense of testing Accuracy of Returns — "To make out lists of voters" — Mandamus to Overseers to pay Salary — Vestries Act*, 1850 (13 & 14 *Vict. c.* 57), *ss.* 7, 8 — *Representation of the People Act*, 1884 (48 & 49 *Vict. c.* 3), *s.* 9, *sub-ss.* 2, 3.

A writ of mandamus will lie to the overseers of the poor of a parish commanding them to pay to the vestry clerk of the parish the arrears of his salary due under s. 8 of the Vestries Act, 1850, such salary being made chargeable upon and payable out of the moneys to be raised for the relief of the poor.

It is not part of the duties of a vestry clerk under s. 7 of the Vestries Act, 1850, to verify, by canvassing or otherwise, the accuracy of the returns made, under s. 9, sub-ss. 2 and 3, of the Representation of the People Act, 1884, by the owners or other persons rated or liable to be rated in respect of any hereditament which comprises any dwelling-house within the meaning of the Representation of the People Acts, of the name of the occupier of any such dwelling-house for the purpose of entering the names of such occupiers in the rate-book. When the names have been entered in the rate-book, it is the duty of the vestry clerk to make out therefrom the lists of voters, both parliamentary and local government.

RULE NISI directed to the overseers of the poor of the parish of Heston, in the county of Middlesex, to shew cause why a writ of mandamus should not issue commanding them to pay to Hugh Rossindel Peake, vestry clerk of the said parish, the sum of 75*l.*, being two quarters of his yearly salary as such vestry clerk due at Michaelmas, 1910, and for such purpose, if necessary, to make and levy a poor rate, on the grounds that the said overseers had neglected and refused on demand duly made to pay to the said Hugh Rossindel Peake the said salary, although the salary of the vestry clerk was by the Vestries Act, 1850 (13 & 14 Vict. c. 57), s. 8 (1), chargeable on and to be paid out of the poor rate, and the

(1) 13 & 14 Vict. c. 57, s. 7: "It shall be the duty of such vestry clerk, unless otherwise directed by the Poor Law Commissioners"—now the Local Government Board—". . . . to give the notices for claims to vote for members of Parliament, and to make out lists of voters, and get the same printed and published and duly returned according to law, and to attend the Court for revising them, and to prepare, make out, and publish the burgess lists and the lists of constables . . . ."

Sect. 8: "The amount of salary or other remuneration to be paid to the

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overseers of the said parish were by an order of the Local Government Board, dated January 30, 1884, and a letter of the Local Government Board, dated August 13, 1901, directed to pay the salary of the vestry clerk of the said parish.

By an order of the Local Government Board, dated January 30, 1884, and made under the Vestries Act, 1850, so much of the Act as related to the appointment of a vestry clerk was applied to the parish of Heston, the population of which exceeded 2000; and by the order the churchwardens and overseers of the poor of the parish were directed to pay to the person for the time being appointed to the office of vestry clerk under the authority of the order a salary at the rate of 50*l.* per annum or such other remuneration for the performance of the duties of the office as the Local Government Board might, with the consent of such person, from time to time direct or approve, such salary being payable on the usual quarter days. On February 26, 1884, the prosecutor, Hugh Rossindel Peake, was appointed, under the authority of the order, by the vestry to the office of vestry clerk of the parish under the provisions of the Act. At a meeting of the vestry on July 18, 1901, it was resolved that the salary of the vestry clerk should be increased from 50*l.* per annum to 150*l.* per annum as from March 25, 1901, "and that it be part of the duties of the vestry clerk to prepare lists of parliamentary, county, and parochial electors"; that "the overseers be and they are hereby authorized to charge for all payments made by them in connection with the preparation of parliamentary, county, and parochial electors' lists for printing, stationery, postages, and other incidental expenses in connection with such registration"; and that "for the services rendered by the assistant overseer (1) as required by the vestry clerk in connection with the preparation and publication of electors' lists the vestry clerk do pay Mr. W. J. Gardener, assistant overseer, for

vestry clerk, as well as the days and times on which and the persons by whom the same shall be payable, shall be fixed by the said Commissioners, and altered from time to time as there shall be occasion; and such salary or remuneration shall be chargeable upon and paid out of the moneys to be raised for the relief of the poor of any such parish . . . ."

(1) For some years before 1901 and down to the present time there had been an assistant overseer of the parish.

performing such services the sum of 20*l.* to 25*l.*" The resolution further authorized the vestry clerk to make all such applications as might be necessary to the Local Government Board for their formal sanction to the resolution.

On July 24 the prosecutor sent a copy of the resolution to the Local Government Board, and on August 13, 1901, the Local Government Board wrote to him a letter which stated: "I am directed by the Local Government Board to acknowledge the receipt of your letter of the 24th ultimo respecting the proposal to increase your salary as vestry clerk for the parish of Heston from fifty pounds to one hundred and fifty pounds per annum. In pursuance of the provision contained in the order of the 30th of January, 1884, the Board approve of the payment to you of a salary at the rate of one hundred and fifty pounds per annum for your services in the above-mentioned capacity."

In the parish of Heston there were a number of houses in respect of which the rates were paid by the owners and not by the occupiers thereof. In pursuance of certain statutory provisions (1) the overseers of the parish served on the owners of

(1) By s. 19 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), and s. 14 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), the overseers, in making out the poor rate, shall in every case enter in the occupiers column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise.

By s. 9, sub-s. 2, of the Representation of the People Act, 1884 (48 & 49 Vict. c. 3), it shall be the duty of the overseers annually, in the months of April and May, or one of them, to inquire or ascertain with respect to every hereditament which comprises any dwelling-house or dwelling-houses within the meaning of the Representation of the People Acts whether any man, other than the owner or other person rated or liable to be rated in respect of such hereditament, is entitled to be registered as a voter in respect of his being an inhabitant occupier of any such dwelling-house, and to enter in the rate-book the name of every man so entitled, and the situation or description of the dwelling-house in respect of which he is entitled, and for the purposes of such entry a separate column shall be added to the rate-book. By sub-s. 3, for the purpose of the execution of such duty the overseers may serve on the person who is the occupier or rated or liable to be rated in respect of such hereditament a requisition in a particular form, to be accurately filled up and returned to the overseers within twenty-one days after such service, the form requiring the name of every

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dwelling-houses in the parish, who were rated in respect thereof, in each year a notice requiring them to make a return of the name of every person who was on July 15 last and had been up to the date of the return an inhabitant occupier of such dwelling-house. When the returns came in it was the practice to make inquiries at the houses in question, called throughout the case a canvass, so as to verify the accuracy of statements in the returns, and thus to prepare an accurate list of voters for submission to the revising barrister. From 1902 down to 1909, both inclusive, this canvass was carried out under the direction of the prosecutor as vestry clerk, and the expense thereof was in each of those years included in the expenses of the overseers laid before the revising barrister, and allowed in his certificate as part of the expenses of the overseers in connection with the preparation of the list of electors. (1) In January, 1910, the overseers, in looking through the minute-book, saw the minute of the resolution of July 18, 1901, and thereupon a question arose between the overseers and the prosecutor as to whether the expense of making the inquiries as to the accuracy of the owners' returns should not be borne by the prosecutor, the overseers contending that, under the provisions of the Vestries Act, 1850, and under the resolution of the vestry of July 18, 1901, it was the duty of the prosecutor as vestry clerk to prepare the lists of parliamentary, county, and parochial electors, and that in so far as the preparation of the lists necessitated a canvass of the district this would have to be undertaken at his expense, his salary of 150*l.* a year being intended to cover the work; whereas the prosecutor, while admitting that he was liable to prepare the lists of voters and to supervise the printing and publishing of the same, contended that it was no part of his duty to verify by canvass or otherwise the accuracy of the owners' returns and to pay the expense thereof, a duty which lay upon the overseers and which could

person who was on July 15 last and had been up to the date of the return an inhabitant occupier of any dwelling-house in respect of which the person making the return is rated or liable to be rated.

(1) It appeared from the affidavits that one of the overseers who was a respondent to this rule had been an overseer continuously from 1902, and was present at the vestry meeting on July 18, 1901.

not be carried out without the employment of a special staff of canvassers. In June, 1910, when the owners' returns came in, the prosecutor wrote to the overseers asking for instructions with reference to the verification of the returns, and stating that it was necessary for the names in the returns to be entered in the rate-book to enable the preparation of the lists of voters to be completed. The overseers in reply again stated that it was part of the prosecutor's duty as vestry clerk to verify the returns without any special instructions from them; and upon the prosecutor declining to be responsible for the expense of the work of verifying the returns, the overseers gave him notice that they had instructed the assistant overseer of the parish to do the necessary work, and that they would debit him with any expenses incurred by them which were properly payable out of his salary. The canvass was accordingly carried out by the assistant overseer, and he was paid for it. Upon a half-year's salary becoming due to the prosecutor at Michaelmas, 1910, he applied in writing to the overseers for payment thereof, but the overseers refused to pay it upon the ground that they had a claim against him in respect of the expense incurred by the assistant overseer in carrying out the canvass (which was said to exceed the half-year's salary) and in respect of moneys which had been paid to him from the year 1901 down to that time in connection with the preparation of the voters' lists in excess of his proper remuneration. The prosecutor thereupon obtained the above-mentioned rule nisi for a mandamus.

Jan. 31. *Danckwerts, K.C.*, and *Scholefield*, for the overseers, shewed cause. There being another adequate existing remedy, the Court will not in the exercise of its discretion grant a mandamus: *Rex* v. *Bishop of Chester* (1); *Reg.* v. *Registrar of Joint Stock Companies*. (2) The overseers have the money in hand for the poor rate wherewith to pay the prosecutor's salary, if in the circumstances it is payable. An action of debt will lie against the overseers to recover the salary founded upon s. 8 of the Vestries Act, 1850: *Anon.* (per Holt C.J.) (3); Comyns' Digest, Debt,

(1) (1786) 1 T. R. 396. (2) (1888) 21 Q. B. D. 131.
(3) (1703) 6 Mod. 27.

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A. 9; *Tilson* v. *Warwick Gas Light Co.* (1); *Hopkins* v. *Mayor, &c., of Swansea* (2); *Reg.* v. *Hull and Selby Ry. Co.* (3); *Crocker* v. *Plymouth Corporation.* (4) If an action of debt will not lie, an action on the case against the overseers will lie for breach of duty in refusing to pay the salary having funds in their hands: *Cane* v. *Chapman.* (5) The overseers resist this application for a mandamus upon the ground that it is their duty to take care that the poor rate is not diverted from its legitimate objects and applied to an illegal purpose: *Reg.* v. *Great Western Ry. Co.* (6) Under s. 8 of the Vestries Act, 1850, the salary of the vestry clerk is chargeable upon and payable out of the poor rate of the parish, which is under the control of the overseers, and by the order of the Local Government Board dated January 30, 1884, and made under the Act, the churchwardens and overseers were directed to pay to the vestry clerk for the time being a certain salary, which was subsequently increased to 150*l.* a year. There being a statutory duty on the overseers to pay the salary, an action of debt or on the case will lie, and therefore the Court will refuse to issue a mandamus. The facts can be better ascertained and the case better investigated in an action than upon an application for a mandamus.

Next, the duty of making the canvass for the purpose of verifying the accuracy of the owners' returns is imposed upon the vestry clerk by s. 7 of the Vestries Act, 1850. The vestry clerk has to "make out lists of voters," that is to say, accurate lists of voters. The lists of voters now include the lists of parliamentary, county, and parochial voters. Under the Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), the overseers of every parish have to prepare and publish lists of voters, and by s. 34 they have to attend the revising barrister's Court. By s. 101 "'overseers' or 'overseers of the poor' shall extend to and mean all persons who, by virtue of any office or appointment, shall execute the duties of overseers of the poor, by whatever name or title such persons may be called

(1) (1825) 4 B. & C. 962.
(2) (1839) 4 M. & W. 621; affirmed (1841) 8 M. & W. 901.
(3) (1844) 6 Q. B. 70.
(4) [1906] 1 K. B. 494, at pp. 499, 500.
(5) (1836) 5 A. & E. 647.
(6) (1849) 13 Q. B. 327, at p. 339.

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and in whatsoever manner they may be appointed." A vestry clerk, being by s. 7 of the Vestries Act, 1850, appointed to perform the duties as to the registration of voters which are by the Act of 1843 imposed upon overseers of the poor, comes within the definition of "overseers" in s. 101 of the Act of 1843. Overseers have now to make out and prepare the lists of parliamentary, local government, and parochial electors, and that duty is cast upon the vestry clerk. Those duties are now specified in the Registration Order, 1895, and par. 20 of the Instructions at the beginning of Sched. II. of the Order, combined with the last paragraph of s. 19 of the Registration Act, 1885 (48 & 49 Vict. c. 15), and s. 1 of the County Electors Act, 1888 (51 & 52 Vict. c. 10), incorporates in the Registration Order the definition of "overseers" in the Act of 1843. Acts which are to be read together must be construed as if their provisions were contained in one Act: *Canada Southern Ry. Co.* v. *International Bridge Co.* (1) The vestry clerk's duty therefore is that laid down with reference to the duty of the overseers of the poor of a parish, namely, to make out the lists of voters. Sect. 9 of the Vestries Act, 1850, is not against this view, as that section merely means that the overseers may perform the duty of making out the lists of voters themselves instead of leaving that duty to the vestry clerk. The resolution of the vestry of July 18, 1901, and the letter of the Local Government Board of August 13 approving the increase of the vestry clerk's salary from 50*l.* to 150*l.* a year make it quite clear that the duty of preparing the lists of voters was in the vestry clerk, and that in consideration of the extra trouble and expense to which he would be put his salary was very considerably increased. The assistant overseer is appointed under s. 7 of the Poor Relief Act, 1819 (59 Geo. 3, c. 12), and his duties are to be specified on his appointment, and unless he is appointed to do the registration work it is not his duty to do it. Sect. 4, sub-s. 2 (*h*), of the County Electors Act, 1888, which empowers the guardians of a union, with the consent of the overseers of a parish for which an assistant overseer has not been appointed, to appoint a fit person to act as registration

(1) (1883) 8 App. Cas. 723, at p. 727.

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officer for such parish, only applies where no person has been appointed to do the registration work. Here the vestry clerk has to do the registration work. In order to prepare proper lists of voters it is necessary to verify the accuracy of the returns made by the owners of dwelling-houses under s. 9, sub-ss. 2 and 3, of the Representation of the People Act, 1884, and this forms part of the work of preparing the lists which the vestry clerk has to do. Therefore both under s. 7 of the Vestries Act, 1850, and under the resolution of the vestry when the prosecutor's salary was raised, it is the duty of the prosecutor as vestry clerk to test the accuracy of the owners' returns by means of a canvass, and to pay for the expense thereof. As the prosecutor has not done that work, and as the overseers have done it for him, and as he has received moneys for doing that work for some years, to which he was not entitled, the overseers have a claim against him exceeding the salary now sought to be recovered. [*Reg.* v. *Cumberlege* (1) was also referred to.]

*C. A. Russell, K.C.*, and *Morton Smith*, in support of the rule. It is admitted that if there is any other adequate remedy the Court will not grant a mandamus. There is here no other adequate remedy. An action of debt upon the Vestries Act, 1850, to recover the arrears of salary, will not lie, because s. 8 makes the salary chargeable upon and payable out of the moneys to be raised for the relief of the poor, and does not impose any personal liability on the overseers. It may be that an action on the case for damages for breach of duty in not paying the salary out of the poor rate is maintainable against the overseers, as in *Cane* v. *Chapman* (2), but that may be a totally inadequate remedy, and the Court will not refuse a mandamus on that ground. Unless it can be shewn that an action of debt will lie, the Court will not refuse to grant a mandamus. Under s. 8 of the Vestries Act, 1850, and the order of the Local Government Board of January 30, 1884, the overseers of the poor are merely made the paymasters of the salary out of the poor rate which is under their control, and no personal liability is imposed upon them. A mandamus therefore is the appropriate and indeed the only remedy.

(1) (1877) 2 Q. B. D. 366. (2) 5 A. & E. 647.

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Next, the prosecutor has not refused to perform any duty which was cast upon him. There is nothing in s. 7 of the Vestries Act, 1850, which imposes upon the vestry clerk the duty of verifying the accuracy of the owners' returns, nor any obligation to pay for the work of verification. There is in the parish of Heston an assistant overseer, and it is his duty, and not the duty of the vestry clerk, to make out the poor rate and to make all necessary entries in the rate-book. The verification of the owners' returns is primarily for the purpose of making the proper entries in the rate-book. By s. 19 of the Poor Rate Assessment and Collection Act, 1869, as explained by s. 14 of the Parliamentary and Municipal Registration Act, 1878, the overseers in making out the poor rate must in all cases enter in the occupiers column of the rate-book the name of the occupier of every rateable hereditament; and the returns, under s. 9, sub-ss. 2 and 3, of the Representation of the People Act, 1884, from the owners or occupiers of hereditaments which comprise any dwelling-house or dwelling-houses of the persons entitled to be registered as voters in respect of their being inhabitant occupiers of such dwelling-house or dwelling-houses are for the purpose of enabling the overseers to enter the names of the persons so entitled in a special column in the rate-book. There being an assistant overseer in this parish, there is no duty on the vestry clerk to make inquiries for the purpose of making entries in the rate-book. The verification, therefore, of the returns is not part of the duties of the vestry clerk. When the entries are made, the vestry clerk is then in a position to perform his duty of making out and preparing the lists of voters. As to the resolution of the vestry of July 18, 1901, it was passed for the sole purpose of increasing the salary of the vestry clerk, and not for the purpose of imposing new duties upon him in the matter of registration work, and the letter of the Local Government Board shews that the sanction of the Board was given merely to an increase of salary, and not to any extension of the vestry clerk's duties. The resolution of the vestry and the letter of the Board approving the increase of salary were under the provisions of s. 8 of the Vestries Act, 1850, and not under s. 7. The prosecutor admits that under the Act it was his duty to

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make out all the lists of voters, including local government and parochial electors, though these latter classes of voters came into existence after the Act of 1850. But to obviate any doubt upon the matter the resolution expressly stated it to be his duty to prepare the lists of all classes of voters. To prepare the lists does not include the duty to pay for the expense of making inquiries to test the accuracy of the owners' returns. Therefore neither under the Act is it the duty of the vestry clerk to do so, nor has he taken upon himself the duty by accepting the increased salary of making the canvass and paying the expense of it out of his own pocket. The prosecutor is willing, however, to procure the canvass to be done as heretofore, the overseers paying him the expense thereof.

Feb. 1. HAMILTON J. The first point made upon the argument of this rule is that the Court in the exercise of its discretion will not grant a writ of mandamus as there is another appropriate remedy by action. The law is well settled, and it is not necessary to refer to the authorities in detail. "A mandamus," says Field J. in *Reg.* v. *Registrar of Joint Stock Companies* (1), "ought not to be granted where another remedy is provided, which is not less convenient, beneficial, and effectual." In the same case Wills J. says (2): "A mandamus ought not to be granted where there is another appropriate remedy." The question accordingly is whether there is in this case another appropriate remedy besides mandamus. The salary of the vestry clerk is payable by virtue of s. 8 of the Vestries Act, 1850, which provides that "the amount of salary or other remuneration to be paid to the vestry clerk, as well as the days and times on which and the persons by whom the same shall be payable, shall be fixed by the said Commissioners, and altered from time to time as there shall be occasion; and such salary or remuneration shall be chargeable upon and paid out of the moneys to be raised for the relief of the poor of any such parish." It is said that the prosecutor might have recovered the arrears of salary from the overseers by action of debt upon the statute. It is not suggested that there is any privity of contract between him and the overseers,

(1) 21 Q. B. D. at p. 135. (2) Ibid. at p. 136.

nor that he is their servant; but it is said that the statute vests in him a right to a sum of money in their hands, and that therefore an action of debt will lie to recover it. Alternatively it is said that, if an action of debt is not maintainable, he may sue the overseers in an action on the case for damages for breach of duty in not having paid his salary. With regard to an action of debt, it is clear that the Act imposes no personal liability upon the overseers to pay the salary. The Act charges the salary upon the moneys to be raised by them for the relief of the poor, and it has to be paid out of those moneys. There is therefore no action of debt under the statute against the overseers, and there is no cause of action upon any promise to pay. There may, however, be cases where an action would lie against overseers for damages for failure to perform a duty imposed upon them by statute, but, as Lord Alverstone C.J. says in *Crocker* v. *Plymouth Corporation* (1), it depends upon the terms of the statute whether there is any duty on the local authority to pay the officer, which can be enforced by an action on the case alleging the due appointment of the officer and the rendering of services by him, and an obligation upon the authority to provide the money and neglect to provide it. I cannot construe s. 8, which imposes no personal liability in debt to pay the salary, as imposing a personal liability in damages for not paying the salary, and therefore, in my opinion, an action will not lie. Furthermore, as the remedy by action, assuming it lay, might be fruitless if execution could only issue against the overseers personally, and as the security given to the vestry clerk by the section is that of a charge upon and payment out of money raised by the rates, it appears to me that the nature of the remuneration and the security for it point to the remedy being by way of mandamus requiring the overseers to levy, if necessary, a rate out of which to pay the salary, and requiring them to pay it; and therefore the remedy by action would not be appropriate.

The next point taken is that there were valid reasons for not paying the salary—first, because the prosecutor was not willing to perform and in fact had not performed the duties imposed

(1) [1906] 1 K. B. at p. 500.

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upon him as vestry clerk by the statute; and, secondly, that he had received sums in respect of services which he ought to have rendered without further payment beyond his salary, and that therefore the overseers had a claim against him to recover sums which had been overpaid to him. The facts are these. The prosecutor was appointed vestry clerk of the parish of Heston on February 26, 1884. Considerable changes have taken place since then both in the qualifications for parliamentary and local government electors, and in the machinery for creating and maintaining a correct register of all classes of voters. In particular owners of property have been called upon to make returns for the purpose of facilitating the creation of a correct register of persons entitled to the occupation franchise, and these returns require verification. An independent verification by means of what has been called a canvass is gone through before the particulars in the returns are acted upon as correct. This takes place annually and involves a considerable expenditure of time and trouble, and in the parish of Heston it has required the services of more than one person. The practice in Heston down to the end of 1909 was that the verification thus required should be made by or under the direction of the vestry clerk, and that he should receive in addition to his salary reimbursement of expenses thereby incurred. These sums were charged as part of the expenses of the registration work, and were presented by the overseers, to whom the accounts had been rendered, to the revising barrister, who gave his certificate for them, and in due course they were paid by the overseers to the vestry clerk and passed the audit of the Local Government Board auditor.

In January, 1910, the overseers discovered a minute of a resolution passed at a meeting of the vestry on July 18, 1901, the material part of which is as follows: "Resolved unanimously that the salary of the vestry clerk be and the same is hereby increased from the existing amount of 50*l.* to the sum of 150*l.* per annum, as and from the 25th March last, payable quarterly, and that it be part of the duties of the vestry clerk to prepare lists of parliamentary, county, and parochial electors, and that the vestry clerk be and is hereby authorized to make all such

applications as may be necessary to the Local Government Board for their formal sanction to this resolution." The overseers took the view that it was the duty of the prosecutor as vestry clerk, in consideration of his salary of 150*l.* a year, to undertake the canvass above referred to without receiving any extra payment for it either by way of reimbursement of expenses or remuneration for his trouble. The prosecutor, on the other hand, contended that that work did not come within the terms of the resolution or within his statutory duties under the Act, while at the same time he said that he was willing to procure the work to be done if he was paid the expense thereof. The overseers refused to accede to this, and the work was done by the assistant overseer on the direction of the overseers at an expense which is said to exceed the arrears of salary claimed; and the overseers accordingly refused to pay the applicant the two quarters' salary, and allege that they have a claim against him in respect of those expenses and in respect of moneys overpaid to him in the past. The prosecutor thereupon obtained this rule.

A number of questions might arise, apart from the main question whether the vestry clerk is under a statutory liability to do this work, which I need only indicate. Under s. 7 of the Vestries Act, 1850, a vestry clerk has numerous duties to perform, and he is paid a salary for the discharge of all those duties. The salary is not in any way apportioned among them. Even assuming that he is under a duty to do this work, there is nothing in the section which makes it a condition precedent to his right to be paid his salary as it accrues due that he should perform this particular duty, and therefore it may be a question whether there is any right to withhold the salary, whatever claim the overseers may have against him. There might also be a question as to the mode in which the overseers could assert their claim to recover moneys which they have expended in performing duties which, upon their assumption, were not cast upon them by law, and which they did not expend at the vestry clerk's request; and there might also be a further question as to the claim to recover moneys paid in previous years to the applicant, as those payments were made by the overseers upon the certificate of the revising barrister, which is final and conclusive, and which relieved the overseers of

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any liability in respect thereof. But both parties desire to obtain our decision upon the main question as to the obligation of the vestry clerk as such to perform these particular duties.

The material words of s. 7 of the Vestries Act, 1850, which prescribes the duties of a vestry clerk, are these : " To give the notices for claims to vote for members of Parliament, and to make out lists of voters, and get the same printed and published, and duly returned according to law, and to attend the Court for revising them, and to prepare, make out, and publish the burgess lists and the lists of constables." I do not think that the words " make out lists of voters " in themselves include procuring inquiries to be made at his own expense for the purpose of verifying the accuracy of the lists of voters. It is not suggested that the words " get the same printed " oblige the vestry clerk to pay the bill for printing. There might be some question whether the words " and published " oblige him personally to do everything necessary for causing the lists to be published when printed, or whether it is not intended that he should make a charge for the expense of doing so. It is said that the words " to make out lists of voters " must be read as meaning " to make out accurate lists of voters." It is better not to depart from the words used by the Legislature. The duty, whatever it may be, cannot depend upon an enlargement of the language of the Act. To make out lists of voters is a different thing from undertaking a canvass. Still it may be said that some part of the canvass might possibly have been performed by the prosecutor personally, though perhaps to the neglect of his other duties, and that s. 7, which deals with his personal services, might extend to that part of the canvass, and therefore it is necessary to see whether he can be called upon to do so under the words " to make out lists of voters."

By s. 101 of the Parliamentary Voters Registration Act, 1843, " Throughout this Act, in the construction thereof, except there be something in the subject or context inconsistent with or repugnant to such construction . . . . the words ' overseers ' or ' overseers of the poor ' shall extend to and mean all persons who by virtue of any office or appointment shall execute the duties of overseers of the poor by whatever name or title such

persons may be called and in whatsoever manner they may be appointed." This definition is only a repetition of that given in s. 79 of the Representation of the People Act, 1832. It was contended that the vestry clerk is an overseer within that definition, and that everything which the overseers have to do in this connection, including the duty apparently cast upon them of verifying the owners' returns, is cast upon the vestry clerk. When s. 19 of the Poor Rate Assessment and Collection Act, 1869, s. 9, sub-ss. 2 and 3, of the Representation of the People Act, 1884, and Sched. II. of the Registration Order, 1895, are looked at, it is clear that prima facie the overseers of the poor are the officers upon whom is imposed the duty of making the investigations necessary for securing accurate lists of voters to be laid before the revising barrister. It is not, in my opinion, correct to say that the word "overseers" by reason of s. 101 of the Act of 1843 includes the vestry clerk, at any rate with regard to the duties in question, and the words of s. 101 may properly apply to other persons such as the assistant overseer. Therefore I do not think that, for the purpose of these duties, the word "overseers" includes the vestry clerk.

A further answer has been made. It is the overseers' duty under s. 9, sub-s. 2, of the Representation of the People Act, 1884, to inquire annually with respect to every hereditament which comprises any dwelling-house or dwelling-houses whether any man, other than the owner or person rated or liable to be rated in respect of such hereditament, is entitled to be registered as a voter in respect of his being an inhabitant occupier of any such dwelling-house, and to enter in a separate column in the rate-book the name of every man so entitled; and, by sub-s. 3, for the purpose of the execution of such duty the overseers may serve on the person who is the occupier or rated or liable to be rated in respect of such hereditament, or on some agent of such person concerned in the management of such hereditament, a requisition requiring that the form be accurately filled up and returned to the overseers within twenty-one days. Whatever duties the vestry clerk may have under s. 7 of the Vestries Act, 1850, it can only be where there is no collector of poor rates or no assistant overseer that it is his duty to make out the poor rate or to make

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the necessary entries in the rate-book. In the parish of Heston there is an assistant overseer. Inasmuch, then, as the object of this machinery is primarily to secure proper entries in the rate-book, and as there is an assistant overseer in the parish whose duty it is to make those entries, it seems to me that it is no part of the duty of the vestry clerk under s. 7 of the Vestries Act, 1850, to verify the owners' returns. It is no part of his duty therefore to undertake this canvass.

There remains another point. It is said that, though it may not have been the duty of the vestry clerk under the provisions of s. 7 to undertake the canvass, that section provides for the possibility of his duties being extended, and that in 1901 his duties were extended so as to include this work. There was in 1901 some controversy in Heston as to the salary and expenses of the vestry clerk. We have refused to admit evidence as to what passed at the vestry meeting on July 18, 1901, for this reason, that the vestry cannot fix the vestry clerk's salary and cannot attach duties to his office under the Vestries Act, 1850. The Local Government Board alone can do so. The function of a vestry meeting is to express its view for the information and assistance of the Local Government Board. The Board received the text of the resolution and not the preliminary discussion, and the latter therefore was not part of the materials upon which the Board acted. What the meeting did must be ascertained from the resolution alone. The resolution was forwarded to the Local Government Board, and in reply the Board wrote the letter of August 13, 1901. My view of that letter is that the Board were not purporting to act under s. 7 of the Vestries Act, 1850, and to prescribe the duties to be performed by the vestry clerk, but merely meant to fix his salary at 150*l.* a year under s. 8. It seems to me that the Local Government Board must not be taken to have prescribed increased duties for the vestry clerk unless it has done so in express terms. The prosecutor through his counsel recognizes his obligation to prepare the lists of parliamentary, county, and parochial electors, as mentioned in the resolution of the vestry, but he does not recognize any obligation under those words to undertake the canvass; he only recognizes the preparation of the county and

parochial electors' lists as being now within the sphere of his duties as well as the parliamentary electors' lists. While it is quite proper that he should express that recognition, I think that, as it has become necessary by legislation subsequent to the Vestries Act, 1850, to have lists prepared of persons qualified to vote in county and parochial elections, the words "lists of voters" in s. 7 must be read as including those lists, though they were not in existence in 1850. The Local Government Board having approved of the payment of 150*l.* a year as the salary for the discharge of the duties for the time being falling by law upon the vestry clerk, it seems to me that the preparation of the lists of all voters is included in those duties, though not entirely at his own expense or entirely by his own personal services, and it is not part of his duties to undertake the verification of the owners' returns or to pay for the expense of the verification. The rule must be made absolute.

AVORY J. I am of the same opinion. By an order of the Local Government Board dated January 30, 1884, and made under the Vestries Act, 1850, the churchwardens and overseers of the parish of Heston were directed to pay a salary of 50*l.* a year to the vestry clerk, such salary being chargeable upon and payable out of the moneys raised for the relief of the poor. By an order of the Local Government Board dated August 13, 1901, the salary was increased to 150*l.* a year as from Lady Day, 1901. The overseers have refused to pay that salary since Lady Day, 1910, although demand has been made upon them. This refusal constitutes a neglect to perform a statutory duty which prima facie entitles the vestry clerk to ask for a writ of mandamus to compel performance of that duty. The overseers resist this application upon three grounds. The first ground is that the vestry clerk has not done his duty and has not earned his salary. The second is that, that being so, the overseers have a set-off or counter-claim against him. The third is that the prosecutor has an alternative and appropriate remedy. They say that, even if a prima facie case is made out for a mandamus, the Court in its discretion ought upon one or more of these grounds to refuse to issue the writ.

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With regard to the first point, the duty which the vestry clerk is alleged to have failed or refused to perform is the verification of the owners' returns of the names of occupiers of dwelling-houses under s. 9 of the Representation of the People Act, 1884, which is called throughout the documents in this case canvassing. This duty is said in the first place to be imposed by s. 7 of the Vestries Act, 1850, under the words "to give the notices for claims to vote for members of Parliament, and to make out lists of voters, and to get the same printed and published"—a duty which, if it exists, has been incumbent upon the vestry clerk ever since his appointment in 1884. Alternatively, the overseers say that the duty is imposed upon him by an agreement made when his salary was raised to 150*l.* in 1901, and the resolution of the vestry meeting of July 18, 1901, is relied upon for that purpose, the particular words relied upon being "that it be part of the duties of the vestry clerk to prepare lists of parliamentary, county, and parochial electors." In my opinion this duty is not imposed upon the vestry clerk by the Vestries Act, 1850. It is part of the duties of the overseers, if any one, under s. 9 of the Representation of the People Act, 1884. It is suggested that the definition of "overseers" in s. 101 of the Parliamentary Voters Registration Act, 1843, makes the vestry clerk an overseer. I do not think that that contention is sound. The vestry clerk does not within the meaning of that interpretation clause execute the duties of overseers of the poor by virtue of his office as vestry clerk. Such definition applies to the case mentioned by my brother Hamilton of an assistant overseer, and it would also apply to such cases as the present borough councils in the county of London, who by s. 11, sub-s. 1, of the London Government Act, 1899 (62 & 63 Vict. c. 14), are expressly made overseers of every parish within their respective boroughs. As to the alleged agreement in 1901 it is contended that the words above mentioned must have been inserted for some reason. I think that a sufficient explanation is that they were intended to exclude any doubt as to the duty of the vestry clerk to make out the lists of county and parochial electors. The duties of the vestry clerk are fixed by the Vestries Act, 1850. Additional duties can only be imposed upon him by the Local Government Board under s. 7 of the Act. There is nothing in the

letter of the Local Government Board of August 13, 1901, sanctioning the increase of his salary, which increases or alters his duties. Having regard to the conduct of the parties afterwards down to the year 1909, and to the fact that year by year these expenses were included in the revising barrister's certificates as they had been before the year 1901, which certificates are by statute made final and conclusive, and to the fact that year by year these expenses were duly audited and allowed by the Local Government Board auditor as part of the expenses of the overseers, and to the fact that one of the overseers, who is now a respondent to this application, was present at the meeting in 1901 and became an overseer in 1902, and from that time down to the year 1910 never took any objection to these expenses as being part of the expenses of the overseers, it is to my mind impossible to hold that this resolution meant to impose additional duties on the vestry clerk.

The second point assumes that the main contention of the prosecutor is wrong, and the overseers claim to have a set-off or counter-claim to his claim for salary. It is clear that there cannot be a set-off; there can only be a counter-claim, which is enforceable at the suit of the Attorney-General. That remedy, if it exists, can still be pursued, and in my opinion it affords no ground for refusing to issue a writ of mandamus.

The last point is that there is an equally appropriate remedy by action. Even if an action can be brought to recover the arrears of salary, the question is whether it is an equally convenient and effectual remedy. Notwithstanding the authorities which have been referred to I am not satisfied that an action could be brought against the overseers in respect of this salary. If any action would lie, it would be an action to recover damages for breach of the statutory duty to pay the salary; and having regard to the fact that the overseers are not a corporate body but are a collection of changing individuals, and that the money which is said to be now in their hands might not be there when the action was tried, I am satisfied that the suggested action would not be an equally convenient and effectual remedy, and the Court ought not to enter into any bargain with the overseers to make it so.

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For those reasons I think that the rule should be made absolute.

*Rule absolute.*

Solicitor for prosecutor: *F. C. Greville-Smith.*

Solicitors for respondents: *Elvy Robb & Welch.*

W. F. B.

*Explained.* A.-G. *v.* ST. AUBYN (No. 2). [1950] 1 All E.R. 951.

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*April* 5, 6.

## THE ATTORNEY-GENERAL *v.* SECCOMBE.

*Revenue—Estate Duty—Gift inter vivos—Entire Exclusion of Donor—Benefit to him by Contract or otherwise—Donor allowed to reside in Property granted—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*a*)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11, *sub-s.* 1—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*).

By s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, the description of property required to be included in an account and made subject to duty under s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act, 1881, and therefore to estate duty under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, "shall include property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise."

The owner of a farm and dwelling-house thereon by a deed of gift in 1897 in consideration of natural love and affection conveyed and assigned the farm, with the dwelling-house and other buildings and the live and dead stock and the other chattels thereon, to the defendant, his great-nephew, who resided with him, and who had in the preceding year taken over the management of the farm. The donor had no property other than that included in the deed, except an annuity of 15*l.* chargeable upon certain land belonging to the defendant. After the execution of the deed the donor continued to reside in the house until his death in 1906, and was maintained by the defendant, who retained the annuity, which was sufficient to meet the cost of his maintenance, but there was no agreement or understanding between the donor and the defendant that the former should be permitted to remain in the house or be maintained by the defendant. Upon the death of the donor the Crown claimed estate duty upon the value of the property comprised in the deed upon the ground that bona fide possession and enjoyment of the property were not assumed by the donee and thenceforward retained "to the entire exclusion of the donor, or of any benefit to him by contract or otherwise":—

*Held* that, though the donor was permitted by the donee to and did

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in fact reside in the house from the date of the deed until his death, there was an entire exclusion of the donor from the possession and enjoyment of the property or of any benefit to him by contract or otherwise, within the meaning of the section, and that therefore estate duty was not payable.

The words "or otherwise" in the sentence "or of any benefit to him by contract or otherwise" must be read as meaning some arrangement ejusdem generis with contract, that is to say, an enforceable arrangement.

*Lord Advocate* v. *Stewart* (1906) 8 F. 579, followed.

INFORMATION by the Attorney-General claiming estate duty.

1. By an indenture dated May 26, 1897, and made between John Hocken Seccombe, since deceased (therein described as of Tregawne, in the parish of Michaelstow, in the county of Cornwall, yeoman, and hereinafter called John Hocken Seccombe, the elder), of the one part, and the defendant (therein described as John Hocken Seccombe the younger, of Tregawne, in the parish of Michaelstow, yeoman, a great-nephew of the said John Hocken Seccombe) of the other part, after reciting that John Hocken Seccombe the elder had since February, 1896, put the defendant in actual possession of his lands and farms, and had also delivered over to the defendant his farm stock, goods, and chattels, and that John Hocken Seccombe the elder was desirous of confirming such delivery and donation by the said indenture, it was witnessed that, in consideration of the natural love and affection which John Hocken Seccombe the elder bore towards the defendant, John Hocken Seccombe the elder as beneficial owner granted unto the defendant, his heirs and assigns, all the houses, farms, lands and premises therein described and for many years farmed by John Hocken Seccombe the elder, but which had since February, 1896, been farmed by the defendant, and being, first, all that tenement called Tregawne, situate in the parish of Michaelstow, also certain other lands in the parishes of Michaelstow, Advent, and St. Breward, and lastly all other the lands, houses, and premises of whatever tenure the same might be of or to which John Hocken Seccombe the elder was seised or in any way entitled, to hold the said lands, houses, hereditaments, and premises unto and to the use of the defendant in fee simple. And it was further witnessed that John Hocken Seccombe the elder thereby declared that all the live and dead stock, furniture,

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plate, goods, and chattels in and upon all the farm fields and lands thereby assured and in the occupation of the defendant were the sole property of the defendant, and by way of confirmation John Hocken Seccombe the elder thereby assigned and transferred the same to the defendant, his executors, administrators, and assigns.

2. The property mentioned or comprised in the indenture of May 26, 1897, constituted in fact the whole estate of John Hocken Seccombe the elder, and by making over the same to the defendant as aforesaid he denuded himself of all means of maintaining and supporting himself. The defendant never had any property other than the property mentioned or comprised in the said indenture or property derived therefrom.

3. After the execution of the indenture of May 26, 1897, John Hocken Seccombe the elder continued until his death to reside at the house known as Tregawne (being a house standing upon the tenement in the said indenture first described), and he was maintained and supported by the defendant out of moneys derived by the defendant from the property mentioned or comprised in the indenture. John Hocken Seccombe the elder was never excluded from the said house, nor was his right to reside thereat or to be maintained and supported by the defendant ever questioned.

4. The informant charged that John Hocken Seccombe the elder continued to reside at Tregawne and to be maintained and supported by the defendant as aforesaid in pursuance of an arrangement that was at or prior to the date of the indenture of May 26, 1897, come to between John Hocken Seccombe the elder and the defendant. But whether that was so or not, bona fide possession and enjoyment of the property mentioned or comprised in the indenture were not in fact assumed by the defendant immediately upon the gift and thenceforward retained to the entire exclusion of John Hocken Seccombe the elder or of any benefit to him by contract or otherwise. (1)

(1) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . . . (c) Property which would be required on the death of the deceased to be included in

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5. John Hocken Seccombe the elder died on January 30, 1906.

6. In the circumstances hereinbefore appearing estate duty at the appropriate rate became payable under s. 1 and s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, upon the death of John Hocken Seccombe the elder in respect of the property mentioned or comprised in the indenture of May 26, 1897. The Commissioners of Inland Revenue caused application to be made to the defendant as the person accountable for an account and payment of the said duty, but the defendant refused to deliver such account or to pay such duty, and he contended that no such duty was payable.

The Attorney-General on behalf of His Majesty prayed that it might be declared that upon the death of John Hocken Seccombe the elder estate duty at the appropriate rate became payable under the provisions of the Finance Act, 1894, upon the principal value of the property mentioned or comprised in the indenture of May 26, 1897.

The defendant in his answer denied that the property

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an account under section thirty-eight of the Customs and Inland Revenue Act, 1881, as amended by section eleven of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, sub-s. 2: "The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:—(*a*) Any property taken as a donatio mortis causa made by any person dying on or after the first day of June, 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been bona fide made three months before the death of the deceased."

Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11, sub-s. 1: "Sub-section two of section thirty-eight of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:—The description of property marked (*a*) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise . . . ."

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mentioned or comprised in the indenture of May 26, 1897 (hereinafter called the property in question), constituted the whole estate of John Hocken Seccombe the elder, or that in making over the same to the defendant as in the information mentioned John Hocken Seccombe the elder denuded himself of all means of maintaining and supporting himself, or that the defendant never had any property other than the property in question or property derived therefrom. John Hocken Seccombe the elder was entitled to a life annuity of 15*l.* per annum secured to him by an indenture dated April 28, 1884, and made between himself of the first part, Susannah his wife of the second part, and Elizabeth Grace Seccombe of the third part, and thereby charged on certain real estate in the same indenture described which on the death of the said Elizabeth Grace Seccombe on February 26, 1891, passed to the defendant as devisee under her will.

Paragraph 5: "It is the fact that after the execution of the said indenture of May 26, 1897, the said John Hocken Seccombe the elder continued until his death to reside at the house known as Tregawne, but he was not maintained or supported by the defendant out of moneys derived by the defendant from the property in question. He was never physically excluded from the said house. He had no right to reside at the said house or to be maintained or supported by the defendant, and no such right was ever suggested or mentioned. At the date of the said indenture of May 26, 1897, the said John Hocken Seccombe the elder was eighty-two years old and was allowed by the defendant of his own free will to live in the said house which stands upon the tenement in the said indenture first described."

Paragraph 6: "The said John Hocken Seccombe the elder did not reside at Tregawne nor was he maintained or supported by the defendant in pursuance of any arrangement whatever. The gift of the property in question to the defendant was in fact made on the occasion of the defendant attaining his majority on February 10, 1896, and was confirmed by the said indenture of May 26, 1897. Bona fide possession and enjoyment of the property in question were in fact assumed by the defendant immediately upon the gift and thenceforward retained to the entire exclusion of the said John Hocken Seccombe the elder or

of any benefit to him by contract or otherwise. Alternatively, if it should be held that the said John Hocken Seccombe the elder was not entirely excluded by reason of continuing to reside in the said house by permission of the defendant, the said John Hocken Seccombe the elder was entirely excluded from the property in question and from all benefit of every kind except the privilege of residing in the said house, and the defendant will contend that in any case no part of the property in question passed on the death of the deceased except the said house."

Evidence was called on behalf of the defendant, the effect of which is stated in the judgment. It is sufficient here to state that the defendant was born on February 10, 1875, and that when he was two years old his father, who was the nephew of John Hocken Seccombe the elder, died, and he then went to live with his great-uncle, John Hocken Seccombe the elder, at Tregawne, in Cornwall, and continued to live there. The defendant's mother died in February, 1891. When the defendant came of age his great-uncle, who was greatly attached to and who reposed full confidence in him, gave him possession of all his lands and house, and farm stock and other effects, and in the following year the deed of May 26, 1897, was executed on the advice of a solicitor to confirm the gift of the preceding year. The great-uncle was at the date of the deed eighty-two years of age, and he had for some little time past allowed the defendant to manage the farm. After the execution of the deed the great-uncle continued to reside in the house and was maintained by the defendant, the annuity of 15*l.* mentioned in the answer not being paid by the defendant to his great-uncle, but being retained by the defendant in payment of his board.

*Sir Rufus Isaacs*, *A.-G.*, and *Austen-Cartmell*, for the Crown. Estate duty is payable upon the principal value of the property comprised in the deed on the death of the donor, John Hocken Seccombe the elder, under s. 1 and s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. The latter section includes in property passing on the death of the deceased property which would be required to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of

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the Customs and Inland Revenue Act, 1889, if those sections were therein enacted and extended to real property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom. Sect. 11, sub-s. 1, of the Act of 1889 includes within s. 38, sub-s. 2 (*a*), of the Act of 1881 "property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise." There was not in the present case an entire exclusion of the donor from the enjoyment of the property. It is clear that if there is an enforceable agreement that the donor shall be maintained out of the property the subject-matter of the gift, or that he shall continue his enjoyment of the property or any part thereof or receive any benefit from it, estate duty is payable. It is not necessary, however, in order to bring the case within the Act, that there shall be an enforceable agreement to the above effect; it is sufficient if there is an honourable understanding not to exclude the donor from the possession and enjoyment of the property. Again, apart from any agreement or honourable understanding, if the donor in fact continues to enjoy the benefit and is not in fact entirely excluded, the duty is payable. In each of these cases possession and enjoyment of the property cannot be said to be assumed by the donee "to the entire exclusion of the donor, or of any benefit to him by contract or otherwise." These latter words mean by a contract enforceable at law or by some other arrangement whether legally enforceable or not. Sect. 8 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), which deals with dispositions to take effect at periods ascertainable by reference to death, shews why these words were introduced into the Act. That section provides that "where any disposition of property shall purport to take effect presently, or under such circumstances as not to confer a succession, but by the effect or in consequence of any engagement, secret trust, or arrangement capable of being enforced in a Court of law or equity, the beneficial ownership of such property shall not bona fide pass according to such disposition, but shall in fact devolve

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to any person on death," a succession takes place. That only includes an arrangement capable of being legally enforced. The language of the enactment now in question is purposely altered so as to include any arrangement whether legally enforceable or not. The doctrine ejusdem generis cannot apply to the words "by contract or otherwise." Those words include an arrangement or understanding which is left to the honour of the donee to carry out. Any interest reserved to the donor is sufficient to render the whole property subject to duty: *Attorney-General* v. *Earl Grey* (1), a decision which was affirmed by the House of Lords. (2) It is not necessary that the donor should part with all his property. It may be said that the case of *Lord Advocate* v. *Stewart* (3) is against the Crown's contention, but that case turned entirely upon the admissions of fact. The Lord President treats the question there as one of fact, and the facts were not left to be drawn by inference from testimony, but were settled by the admissions. But even if that decision is in point, it is not right in law, and not being binding on this Court it ought not to be followed.

*Danckwerts*, *K.C.*, and *J. E. Harman*, for the defendant. The words "to the entire exclusion of the donor" in s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, mean to the entire legal exclusion of the donor, and the words "or of any benefit to him by contract or otherwise" refer to some legally enforceable benefit or interest. Some limitation must be placed on the words "or otherwise." They must be read as ejusdem generis with "contract," that is to say, as meaning some legally enforceable benefit, and the reasoning in *Monck* v. *Hilton* (4) supports this view. An equitable charge would be something ejusdem generis with contract.

The benefit to the donor must be a benefit reserved out of or connected with the property in question. That is the opinion of the Lord President and the judges who agreed with him in *Lord Advocate* v. *Stewart* (5), which was a decision upon similar words in s. 11 of the Finance Act, 1900 (63 & 64 Vict. c. 7),

(1) [1898] 1 Q. B. 318; [1898] 2 Q. B. 534.
(2) [1900] A. C. 124.
(3) 8 F. 579.
(4) (1877) 2 Ex. D. 268.
(5) 8 F. 579, at p. 595.

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and in which it was held that the mere occupation of a room as a guest, and not as of right, in the house the subject-matter of the gift was not such a "benefit" as is contemplated by the section. That was also the opinion expressed by the judges in *Attorney-General* v. *Earl Grey*. (1) Even, however, if the benefit is not limited to one reserved out of or connected with the property, it must be a legally enforceable benefit. The decision in *Lord Advocate* v. *Stewart* (2) is in point and ought to be followed. In taxing Acts which affect persons residing in any part of the United Kingdom it is desirable that the decisions of the various Courts should be uniform. Mere permission to the donor to occupy a bedroom in the house is not sufficient to bring the case within the Act. The "entire exclusion of the donor" is not violated by a voluntary permission to him to reside as a guest in the house. "Exclusion" does not mean physical exclusion. It implies that the donee has the right to exclude the donor. It would be absurd to say that, if the donor were after the gift invited by the donee to stay at the house as his guest for however short a time, the property would be subject to duty. The gift in the present case was complete, and the arrangement was a perfectly honest one effected by the donor out of love and affection to his great-nephew, the donee. The donor from the date of the gift placed himself entirely at the mercy of the donee, having full confidence in him. It was not a mere device or sham to enable the donor to retain possession of the property. The donee bona fide assumed and retained the legal possession and enjoyment of the property to the entire exclusion of the donor and of any benefit to him by contract or otherwise, and therefore estate duty is not payable in respect of the property.

*Austen-Cartmell* in reply. In *Attorney-General* v. *Earl Grey* (1) the benefit was reserved out of the subject-matter of the gift, and the Courts there only purported to deal with that state of facts and did not lay down any general principle. No doubt the Lord President in *Lord Advocate* v. *Stewart* (3) states that the benefit from which the cedent (or donor) is excluded is a benefit

(1) [1898] 1 Q. B. 318; [1898] 2 Q. B. 534; [1900] A. C. 124.
(2) 8 F. 579.
(3) 8 F. at p. 595.

which was part of the property before the cession. That decision, however, is in conflict with *Attorney-General* v. *Worrall* (1) and ought not to be followed. In the present case the donor was not entirely excluded from the possession and enjoyment of part of the property the subject-matter of the gift. He continued to live in the house and thus obtained a benefit. The proper inference from the facts is that there was an honourable understanding between the donor and donee when the gift was made that the donee would allow the donor to continue to occupy a bedroom and live in the house and would maintain him during the rest of his life. The 15*l.* a year which the donee retained was not sufficient to cover the expense of his board. Even apart from any honourable understanding the donor was in fact allowed to continue to live in the house. A casual visit from time to time might not bring the case within the Act, but continuous residence in fact is different, and points to the non-exclusion of the donor. In either case the Act applies and estate duty is payable. [*Attorney-General* v. *Johnson* (2) was also referred to.]

HAMILTON J. By the deed of gift of May 26, 1897, John Hocken Seccombe the elder in consideration of natural love and affection gave his farmhouse and farm lands of Tregawne and other tenements and all his other lands, houses, and premises of whatever tenure of which he was seised or to which he was entitled to the defendant, his great-nephew, in fee simple; and it was further declared that all the live and dead stock, furniture, plate, goods, and chattels in and upon the said farms and tenements were the sole property of the defendant, and by way of confirmation John Hocken Seccombe the elder assigned them to the defendant. The deed was executed upon the advice of a solicitor in order to confirm a gift to the like effect which had been made in the preceding year, when the defendant came of age. At the time of the execution of the deed the donor was eighty-two years of age, and was becoming incapacitated for active work. He had for some time past taken little active part in the management of the farm outside at any rate the

(1) [1895] 1 Q. B. 99. (2) [1903] 1 K. B. 617.

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farmhouse and stock yard, the active management having been in the hands of the defendant. The intention that the whole farm should belong to the defendant when he came of age had been expressed to him more than once by the donor, and the condition of things at the farm continued with little outward change until the donor died in 1906. From the time the defendant came of age the donor ceased to take any part in the management of the farm. He no longer signed cheques on the banking account; he no longer received the annuity of 15*l.*, which was charged upon another property belonging to the defendant; and, so far as domestic details are concerned, he no longer sat at the head of the dinner table, but at the side.

The Crown claims estate duty upon the death of the donor in respect of the property comprised in the deed of 1897, by virtue of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, which incorporates s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, as being "property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise." No point is made upon the words "assumed by the donee immediately upon the gift," and although the defendant merely continued living in much the same way after as before the gift, it seems to me that those words are satisfied, and that if bona fide possession and enjoyment were assumed by him at all, they were assumed by him immediately upon the gift and thenceforth retained.

This is an arrangement by which an aged donor, out of love and affection, purports to give his property to a great-nephew, who stands in a filial relation to him, while at the same time no apparent change is made. It may be that from such circumstances unexplained an inference might be drawn which would entitle the Crown to estate duty. But the inference would be that the transaction was not bona fide, and that possession and enjoyment so assumed were not bona fide assumed—in other words, that the arrangement was a sham. No such case, however, is made here. The Crown does not suggest that

the transaction was not bona fide, and that the deed of gift was a sham and not a real deed. I am satisfied upon the facts that there was entire good faith throughout, and that the transaction was carried through without any idea of escaping revenue duties.

The Crown relies upon the latter words of the section, "of which property bona fide possession and enjoyment shall not have been . . . . thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise." The property is the entire corpus passing under the deed, and therefore, though the point was taken in the answer that the duty might be leviable in respect of the house in which the donor continued to live and not upon the entire corpus, that point was very properly not argued, because there is considerable authority for saying that where there is one corpus conveyed by the gift, if duty attaches at all, it attaches to the whole. This appears to have been recognized by Channell J. in *Attorney-General* v. *Earl Grey* (1), and also in *Lord Advocate* v. *Stewart*. (2) Inasmuch therefore as the duty, if it attaches at all, attaches to the whole property, one must be careful not to construe the section so as practically to exclude every gift from its saving clause. The intention of the Legislature was to exclude from liability to estate duty a certain category of gifts, and there is a danger of entirely nullifying this provision if the section is construed so that any enjoyment, however slight, by the donor subsequently to the gift will bring the property within the charging words and attach the duty to the whole corpus of the property which passes. I think that grammatically the words must be construed thus: "Property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and of which property bona fide possession and enjoyment shall not have been thenceforward retained by the donee to the entire exclusion of the donor from such possession and enjoyment, or of any benefit to him by contract or otherwise." The word "exclusion" refers, in my

(1) [1898] 1 Q. B. 318, at p. 325. (2) 8 F. 579, at p. 595.

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opinion, to the bona fide possession and enjoyment of the property just as the word "assumed" does. It is clear that the clause is not limited to a reservation out of the property passing under the gift. That point seems to me to be concluded against the defendant by the decision in *Attorney-General* v. *Worrall* (1), which was recognized in *Attorney-General* v. *Johnson*. (2)

It is said on behalf of the Crown that, though the donor may not have reserved to himself any right to possession or enjoyment of the property or any part thereof, there is not an "entire exclusion" of him within the meaning of the clause if he has in fact access to the place, that is, if he has in fact a considerable degree of presence in the place which is the subject-matter of the gift, and enjoys an advantage, whether sentimental or otherwise, by being there. That is a proposition which, in my opinion, cannot be maintained. The decision in *Lord Advocate* v. *Stewart* (3) is against it, and although it is not binding upon me, yet for the sake of preserving uniformity of decision in the United Kingdom in the case of taxing Acts I ought to follow it unless I find myself unable to agree with its principle. Upon this point I can see no reason for differing from it. The principle there laid down, as I understand it, is that the possession and enjoyment or benefit from which the Act contemplates that the cedent or donor must be entirely excluded must be derived from some enforceable right, a benefit, as the Lord President said (4), "which was part of his property before the cession," and therefore not merely a benefit which is derived from his being present for a greater or less time in the old house by leave and licence of the donee. I think that that is what the Lord President is referring to when he says that "any other reading would, I think, drive the clause mad; because it would mean that if the cedent was after the cession even allowed again to set foot on the ceded property, the whole transaction for the purpose of duty is held as non-existent." Lord Pearson, who dissented from the rest of the Court, rested his judgment, as I understand it, upon a conclusion of fact that there was in some degree, though very small, an enjoyment by the donor of the same kind as before.

(1) [1895] 1 Q. B. 99.
(2) [1903] 1 K. B. 617.
(3) 8 F. 579.
(4) 8 F. at p. 595.

"The sections," he says (1), "have been carefully framed so as to avoid, as far as possible, all questions of degree, and to bring the matter to the simple test of 'entire exclusion,'" thus adhering to the view which he had expressed as Lord Ordinary. (2)

In the present case I am satisfied that there was no contract that in consideration of the gift the donor should be permitted to reside and be maintained by the donee, in part or in whole, in the house; nor was there any understanding to that effect in the sense of an arrangement, or as it is called an honourable understanding, which is not legally enforceable. I have no doubt that neither the donor nor the donee contemplated for one moment that the former would under any circumstances be turned out of the house; but there was no discussion upon the point, and the donor before he executed the deed was fully aware of the fact that after executing the deed he would be at the defendant's mercy, and was fully content to rely upon the filial affection which the defendant bore towards his great-uncle and benefactor. Upon this affection, and not upon any contract or honourable understanding, the donor was content to rely for the advantage which he in fact enjoyed of being allowed to reside in his old house until his death. The transaction was free from any element of harshness or overreaching. The solicitor, who drew the deed and who was an old friend and adviser of the family, told the donor that if he signed the deed the defendant could turn him out of doors; to which the donor replied that he had no fear of that, as the defendant loved him too well. I am satisfied therefore that the donor was entirely excluded from any possession and enjoyment of the property, except such as is involved in his being allowed to sit in his old chair and sleep in his old bed, and to walk round the garden.

The only remaining question is as to the meaning of the latter words of the section, "or of any benefit to him by contract or otherwise." The word "benefit" is not, in my opinion, confined to a benefit conferred by the deed of gift or to a benefit issuing out of the property thereby conveyed. A benefit issuing out of some other property or a benefit given by some separate and independent contract will come within the section. But the

(1) 8 F. at p. 596. (2) 8 F. at p. 592.

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burden of proof is upon the Crown. It is for the Crown to bring the subject within the charge, and therefore it was rightly assumed in paragraph 4 of the information that it lay upon the Crown to establish that there was not an entire exclusion of the donor or of any benefit to him by contract or otherwise. The section does not impose an obligation to pay the duty, leaving the defendant to bring himself within the exception. The Crown must shew, in order to make out its right to the tax, that the property was taken under a gift, and that bona fide possession and enjoyment of it had not been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. It is contended on behalf of the Crown that the words "by contract or otherwise" mean by a contract which is enforceable or by any other arrangement whether enforceable or not. It is said that there cannot be anything ejusdem generis with a contract, and therefore the words "or otherwise" must be given full effect to and the clause must be read as meaning any benefit, sentimental or pecuniary, which is in fact enjoyed, whether it be conferred by contract or not. Reliance in support of that contention is placed upon s. 8 of the Succession Duty Act, 1853, where the words descriptive of the reserved benefit are, "but by the effect or in consequence of any engagement, secret trust, or arrangement capable of being enforced in a Court of law or equity the beneficial ownership of such property shall not bona fide pass according to such disposition." It was not until s. 38 of the Customs and Inland Revenue Act, 1881, that a gift of property made within three months of the death of the deceased, which would otherwise be free from duty, became liable to duty, and this period was subsequently extended by s. 11 of the Customs and Inland Revenue Act, 1889, to twelve months, and now by s. 59 of the Finance (1909-1910) Act, 1910 (10 Edw. 7, c. 8), the period is extended to three years. It is therefore contended that these Acts were intended to be more stringent in their operation than the Succession Duty Act, 1853, and that when the words "by contract or otherwise" were substituted for the words "engagement, secret trust, or arrangement capable of being enforced in a Court of law or equity," it was

intended to convey that the arrangement conferring the benefit need no longer be one capable of being enforced in a Court of law or equity, but might be one which could not be enforced in any Court. I cannot draw that inference. I think that the words "by contract or otherwise" were merely intended to be an improvement in drafting upon the earlier and more diffuse expression. There is no reason why the rule of ejusdem generis construction should not apply to these words. The enactment might have stopped at the words "or of any benefit to him," or it might have said "of any benefit to him of whatsoever kind." It has not done so. The words "by contract or otherwise" indicate a genus of which contract is one species, and all other species are intended to be swept in. I do not see the difficulty of saying that there is a genus of which contract is a species. There are two points to notice about the word "contract" as used in this connection. In the first place it points to a legal obligation; and in the next place it points to a contract between the same persons as were parties to the gift. Hence I think that the words "by contract or otherwise" are aimed at any contract between the parties to the deed of gift or any contract with third parties having the effect of conferring a benefit on the donor, and also any transaction enforceable at law or in equity which, though not in the form of a contract, may confer a benefit, such as a lien. It is therefore not necessary to give any unusual or exceptional construction to the words. In construing a taxing Act the presumption is that the Legislature has granted precisely that tax to the Crown which it has described, and no more; and there is no presumption in favour of extending the scope of the Act. I must therefore follow the usual rule of construction, and in doing so proper operation can be given to the words. There was in this case no benefit to the donor by contract or by any other enforceable arrangement. That is sufficient to dispose of the case, but an issue of fact has been raised and evidence has been given upon it as to the 15*l.* annuity. After the deed of May 26, 1897, the defendant no longer paid this 15*l.* to the donor, but retained the money to pay for the donor's board and lodging. It is clear that the donor must have known that it was being done and assented to it, and no advantage was taken of his age and

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infirmities. It seems to me that it was done to enable the donor to feel that he was paying for his board and lodging, and for that reason he did not include the 15*l.* annuity in the deed of gift, or release it at the time. Therefore so far as the 15*l.* a year went the donor was paying for what he had, and was not receiving a benefit, because a person who pays for that which he receives cannot be said in any reasonable sense to be receiving a benefit from the other party. I have no reason to doubt that this 15*l.* a year was sufficient to pay for his board and lodging. His needs at the age of eighty-two were small, and the family lived in a simple way, and it seems to me that 15*l.* a year was adequate to pay for all that he received. It was said that the benefit to him was not only his board and lodging, but also the fact that he was to continue to live in the old house where he had always lived. I do not see that that merely sentimental benefit is one which can be measured by money or reached by any tax or made the ground for attracting any duty.

I am therefore of opinion that the information must be dismissed.

*Judgment for defendant.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for defendant: *Marshall & Pridham, for A. C. Pomery, Bodmin.*

W. F. B.

[IN THE COURT OF APPEAL.]

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*April 7.*

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*Ex parte* THE GOVERNORS OF ST. THOMAS'S HOSPITAL

*Bankruptcy—Property divisible amongst Creditors—Landlord and Tenant—Assignment of Beneficial Interest in Lease—Trustee and Cestui que Trust—Indemnity—Judgment for Damages for Breach of Covenant—Bankruptcy of Lessee—Vesting of Right of Indemnity in Trustee in Bankruptcy—Recovery of Judgment Debt from Beneficial Owner under Indemnity—Rights of Trustee in Bankruptcy and Landlord—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

A lessee became trustee of the leasehold premises for his wife by reason of the purchase by her of the beneficial interest therein, and the wife as such beneficial owner was liable to indemnify her husband against any claim by the landlord under the covenants in the lease. On the expiration of the lease the landlord obtained judgment against the lessee for 711*l.* for rent and damages for breach of covenant, but before the amount of the lessee's liability was ascertained the lessee was adjudicated a bankrupt. The landlord obtained leave in the bankruptcy to commence an action in the joint names of the trustee in bankruptcy and himself to recover the 711*l.* from the wife under the lessee's right of indemnity, but without prejudice to the question whether the money so recovered should be treated as assets in the bankruptcy or be retained by the landlord. The action was brought and was compromised by the payment by the wife of 520*l.*:—

*Held*, that the trustee in bankruptcy could only avail himself of the right of indemnity for the purpose of passing on the money to the principal creditor, and that consequently the landlord was entitled to retain the money on account of his debt.

Appeal from a decision of Phillimore J.

By two leases dated respectively May 19, 1848, and December 17, 1850, certain houses in St. Thomas's Square, Hackney, were demised by the freeholders, the governors of St. Thomas's Hospital, to H. Bundey and W. Wallis respectively for terms of sixty-one years from March 25, 1847, and the leases contained covenants to repair and to yield up in repair at the end of the respective terms. In 1889 these leases were assigned to Harry Richardson. By virtue of an indenture dated September 30, 1906, Harry Richardson, under the circumstances stated in the report of the *Governors of St. Thomas's Hospital* v. *Richardson* (1),

(1) [1910] 1 K. B. 271.

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became trustee of these terms for his wife, Fanny Richardson, who had purchased the beneficial interest therein. From that date until March 25, 1908, when the leases expired, the wife remained in possession of the demised premises and received the rents and profits thereof, and as the owner of the beneficial interest therein she was liable to indemnify her husband against all claims by the hospital under the covenants contained in the leases. In April, 1908, the governors of the hospital brought an action in the King's Bench Division against Harry Richardson for arrears of rent and for damages for breach of covenant, and ultimately by an order of the Court of Appeal of December 16, 1909, the action was referred to an official referee to ascertain the amount due to the governors of the hospital, and judgment was directed to be entered for them for the amount so found due with costs. On May 12, 1910, the official referee certified that the amount due from Richardson was 429*l.* 18*s.* 6*d.* and directed him to pay the costs of the reference. The costs of the action and of the reference were allowed at 281*l.* 12*s.* 10*d.*

In the meantime, namely, on April 23, 1910, Harry Richardson was adjudicated a bankrupt, and in August, 1910, the governors of the hospital lodged a proof against his estate for the two sums of 429*l.* 18*s.* 6*d.* and 281*l.* 12*s.* 10*d.*, amounting together to 711*l.* 11*s.* 4*d.*, but this proof was not adjudicated upon. On November 18, 1910, the governors of the hospital obtained from the registrar an order giving them liberty to use the name of the official receiver and trustee in the bankruptcy in an action to be brought by them in the High Court of Justice against Fanny Richardson, the wife of the bankrupt, upon the terms, inter alia, "(2.) That if the said governors should recover any sum from the said Fanny Richardson either in the name of the said official receiver or in their names they will thereupon apply to the Court in bankruptcy to determine whether the net sum so recovered by them should be treated as assets divisible amongst the creditors generally or should be retained by them on account of the debt and costs due to them from the bankrupt and to hold the sum so recovered subject to the order of the Court." "(3.) That the costs of the said governors and of the said official receiver in the matter of such application (but not of any appeal

to the Court of Appeal) be paid out of the sum so recovered in any event." Accordingly on November 22, 1910, an action was commenced in the Chancery Division in the joint names of the trustee in bankruptcy and the governors of the hospital against the bankrupt and his wife for a declaration that the wife was bound to indemnify the bankrupt and his estate against the 711*l.* 11*s.* 4*d.* and interest, and for an order against the wife for payment of the said sum and interest. This action was discontinued against the bankrupt but was prosecuted against the wife, and by a consent order the action was compromised on the terms of the wife paying the sum of 520*l.* in satisfaction of all claims in the action.

An application was then made to the judge in bankruptcy by the governors of the hospital in pursuance of the order of November 18, 1910, to determine to whom the balance of the money remaining after payment of the costs directed to be paid by that order belonged.

Phillimore J. on March 13, 1911, held that this balance formed part of the bankrupt's estate and was divisible amongst his creditors generally, and ordered the governors of the hospital to hand over the balance to the trustee.

The governors of the hospital appealed and asked that the balance should be retained by them and applied in reduction or alternatively in satisfaction of their judgment debt and costs.

*The Hon. M. Macnaghten*, for the appellants. This appeal raises a pure point of equity which has never been decided. The right of indemnity in this case does not arise from contract, but arises from the position of trustee and cestui que trust; it is a purely equitable obligation not enforceable at law. It is true that this right of indemnity is an asset in the bankruptcy, but it is nothing more than a right to indemnity. Richardson could only claim from his wife an indemnity against the claim of the hospital, and if the wife induced the hospital to release their claim against the husband he would have no claim against her. The intervention of the bankruptcy makes no difference; the money when received by the trustee in bankruptcy must go to satisfy the claim of the hospital. A trustee

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cannot make a profit out of his trusteeship, and his trustee in bankruptcy is in no better position. But, if the judgment of Phillimore J. stands, the larger the liability of the bankrupt the better for his estate. The trustee in bankruptcy cannot complain if Mrs. Richardson does all that she is bound to do, namely, release the estate from the demand of the hospital. The observations of Jessel M.R. in *Lacey* v. *Hill* (1) strongly support the appellants' contention. The fact that the appellants lodged a proof in the bankruptcy for the amount of their debt does not affect the question. It has neither been admitted nor rejected, and it is still open to them to withdraw it. [He also cited *Hardoon* v. *Belilios* (2); *Cruse* v. *Paine* (3); *In re Perkins* (4); *Carr* v. *Roberts* (5); *Castellan* v. *Hobson.* (6)]

[COZENS-HARDY M.R. referred to *Fraser* v. *Murdoch.* (7)

BUCKLEY L.J. referred to *Hemming* v. *Maddick* (8) and *Heritage* v. *Paine.* (9)]

*Frank Mellor*, for the respondent. There is no authority on the point. The fallacy of the appellants' argument is in saying that the intervening bankruptcy makes no difference; it makes all the difference. There may be cases in which the right of the trustee in bankruptcy is higher than that of the bankrupt. The right of indemnity is property which passes to the trustee in bankruptcy, and the fact that the hospital have tendered a proof shews that they have elected to treat the bankrupt as liable. In this state of things the question is whether the hospital are not in the same position as any ordinary creditor, and whether the trustee in bankruptcy is not entitled to deal with this right of indemnity for the benefit of the bankrupt's estate generally. It is a startling proposition that a trustee in bankruptcy, who does not take trust property at all, may yet be entitled to some property which, when he realizes, he must not distribute as the statute requires amongst the creditors generally, but must hand over to some particular creditor; and a fortiori, when that

(1) (1874) L. R. 18 Eq. 182, 191.
(2) [1901] A. C. 118, 123.
(3) (1869) L. R. 4 Ch. 441.
(4) [1898] 2 Ch. 182.
(5) (1833) 5 B. & Ad. 78.
(6) (1870) L. R. 10 Eq. 47.
(7) (1881) 6 App. Cas. 855.
(8) (1872) 7 Ch. 395.
(9) (1876) 2 Ch. D. 594.

particular creditor has tendered a proof in the bankruptcy as a general creditor. That would be making the trustee in bankruptcy in this one instance a trustee of property which is not trust property. The trustee in bankruptcy cannot hold property except for purposes of a general distribution amongst the creditors. [He cited *Secar* v. *Lawson* (1); *Ashdown* v. *Ingamells* (2); *Wolmershausen* v. *Gullick*. (3)]

[COZENS-HARDY M.R. referred to *Collinge* v. *Heywood*. (4)]

*The Hon. M. Macnaghten* replied.

COZENS-HARDY M.R. This appeal raises a very curious and important point of law. [The Master of the Rolls stated the facts, and continued.] There is no case distinctly and clearly in point. In the first place this is not the case of a contractual right of indemnity. It is merely an equitable right which every trustee has to be indemnified by his cestui que trust. It is a right which the common law would not in any way have recognized. Equity has always taken a wider and more liberal view of these rights of indemnity than the old Common Law Courts did. It is settled at common law that, given a contract of indemnity, no action could be maintained until actual loss had been incurred. The common law view was first pay and then come to the Court under your agreement to indemnify. In equity that was not the view taken. Equity has always recognized the existence of a larger and wider right in the person entitled to indemnity. He was entitled, in a Court of Equity, if he was a surety whose liability to pay had become absolute, to maintain an action against the principal debtor and to obtain an order that he should pay off the creditor and relieve the surety. Another way in which the indemnity was often worked out in the Court of Chancery was by ordering a fund to be set apart to meet the liability as and when it arose. So that in the view of the Court of Equity it was not necessary for the person entitled to the indemnity to be ruined by having to pay the full amount in the first instance. He had full power to take proceedings under which that fate might be averted, and he might substantially

(1) (1880) 15 Ch. D. 426.
(2) (1880) 5 Ex. D. 280.
(3) [1893] 2 Ch. 514.
(4) (1839) 9 A. & E. 633.

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protect himself and secure his position by coming to the Court. Apply that to the case of trustee and cestui que trust. I am not myself aware of any case, other than the cases on the transfer of shares, in which this particular question has been worked out. It has been worked out in a great number of what I may term Stock Exchange cases. Where there has been, taking the simplest instance, a contract for the sale of shares by a person whose name is on the register to A. B., who pays the full amount but whose name is not on the register and does not get on the register before the winding-up of the company, the cases establish that the vendor may say to the purchaser "You agreed to purchase my shares; the transaction is complete except that you did not get on the register before the winding-up, and, although you are not on the register, you must pay the amount of any calls which in fact I, who was merely a trustee of the shares for you, may have had to pay, and there must be a declaration of your liability to indemnify me against all future calls." The nearest case to the present is *Lacey* v. *Hill*. (1) There Sir George Jessel was dealing with a case of this kind. Sir Robert Harvey had bought shares as a speculation to an enormous amount. He bought the shares through some brokers who entered into contracts with jobbers and who were liable on those contracts. The brokers were declared defaulters because at Sir Robert's death under circumstances which are stated in the report they could not pay the jobbers. They claimed to prove in the administration of Sir Robert Harvey's estate. Sir George Jessel in allowing the claim said (2): "Last of all it is said this is a liability as distinguished from an actual payment, and that the agent or person entitled to be indemnified has no remedy. Whatever may be the case at law (as to which I say nothing, because it is not necessary) it is quite plain that in this Court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled

(1) L. R. 18 Eq. 182. (2) Ibid. at p. 191.

to have the money paid over to him." Here of course the ultimate creditor is a party. He goes on to say, "As to the observation that he may compromise for less, the answer is, that the person liable to indemnify can go to the creditor and set him right. It is his own fault that the liability remains."

The respondent says "This right to an indemnity which the bankrupt as trustee had against his cestui que trust is property which vests in me as his trustee in bankruptcy and I am bound to apply that like all other assets of the bankrupt for the benefit of all the creditors." But is that quite so? I cannot think it is. If and when he pays the amount of the debt he will have a right to treat the money, which he can then sue for from the person who is bound to indemnify, as part of the estate, but unless and until he pays I fail to see how it can be in accordance with justice and common fairness that he should be allowed to augment the estate of the bankrupt in a way which results in this, that the greater the liability the greater will be the advantage to the estate. The trustee cannot be allowed to say "I will take the money recovered under my right of indemnity against the claim of St. Thomas's Hospital and will apply it, not towards satisfying the claim of the hospital in the way which the indemnity implies, but as part of the general assets, and I will give no effect whatever to the indemnity except so far as the hospital come in and prove for their claim in the bankruptcy." To allow that would be to allow a trustee to make a profit out of his position as trustee. It seems to me that it cannot be right that the trustee should be allowed to say more than this: "If I pay this amount to St. Thomas's Hospital then I can come against the cestui que trust's estate and claim upon that, or, if I do not pay, then I will take proceedings to indemnify myself against the liability which I am under, giving effect to that indemnity in the only way in which effect can reasonably and properly be given to it by applying the money so recovered in the reduction or complete satisfaction, as the case may be, of the amount due to the hospital." With great respect to the learned judge, I am unable to agree with the conclusion at which he has arrived. I believe that this money is now in the proper hands, namely, the hands of the governors of St. Thomas's

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Hospital, and that there is no ground for treating it as in any way part of the general assets of the bankrupt for the purpose of being distributed amongst his creditors. For these reasons I think the appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. The point raised is one of great importance. The case may be stated simply in this way. Suppose A. has a claim upon B., but in respect of that claim B. has a right of indemnity from C. B. goes bankrupt. Is B.'s trustee in bankruptcy in a position in which he can force C. to pay the amount of the claim to him and then can use the money so obtained for distribution amongst the creditors generally, whereas he only pays a dividend upon the claim which A. has against the bankrupt?

If you seek guidance in the matter from common law, there is no doubt whatever that it went on this principle: It would not help a man to make a profit out of what was merely an indemnity. If, for instance, B. was bound to pay a sum to A. and C. was bound to indemnify B., which is the case before us, then B. could not sue C. unless he could aver payment to A. It was the same thing whether it was a case of suretyship, indemnity, or contribution. In all cases before you could make a guarantor pay you must prove that you had actually paid the money. No better example of this could be given than the case of *Collinge* v. *Heywood.*(1) That was a contract to indemnify a plaintiff against costs, and it was decided that the cause of action arose when he paid the costs, not when the costs were incurred or the attorney's bill was delivered to him; and it happened that it was a point of cardinal importance in that case to decide the moment when the cause of action arose, because it was a question there of the date from which the Statute of Limitations began to run. There the Court applied the well-known common law principle that before you can avail yourself of your right of indemnity you must shew that you have paid the money. As the Master of the Rolls has said, the rule in Chancery was somewhat different, and yet, to my mind, it emphasizes the fundamental principle that you must have paid before you have

1) 9 A. & E. 633.

a right to indemnity, because the remedy which equity gave was a declaration of a right. You could file a bill against the principal debtor to make him pay the debt so that you would not be called upon to pay it, and then you obtained a declaration that you were entitled to an indemnity. You could in certain cases have a fund set aside in order that you might be indemnified, to avoid the necessity of your having to pay and then to sue for the money you had paid, which perhaps would not repair your loss and credit even if it discharged the debt. But I do not think that equity ever compelled a surety to pay money to the person to whom he was surety before the latter had actually paid. He might be ordered to set a fund aside, but I do not think that he could be ordered to pay. I do not know what were the cases to which Sir George Jessel vaguely referred in *Lacey* v. *Hill* (1) as cases where in the absence of the principal creditor the person who is to be indemnified might have the money paid over to him. I can find no such case, and I do not think any such decision would be in accordance with the spirit of the law. Therefore the position is that if the bankrupt has a right to indemnity, but the claim by the principal creditor has not been paid, there certainly would have been no right of action against the surety if bankruptcy had not ensued.

In that state of things, I find the law very clearly laid down in *Ashdown* v. *Ingamells* (2) by Brett L.J. He says: "In my opinion, it is a general principle that where an action is brought for the breach of a contract, the trustee in bankruptcy or liquidation is entitled to recover the same amount of damages for the breach of contract as the bankrupt or insolvent himself would have recovered." Now, in this case, the bankrupt could not have recovered one penny on the contract or obligation of indemnity, because he had not been called upon to pay and had not paid anything to the principal creditor. Therefore I am of opinion that there was at that time no debt that was owing from the wife to the trustee or to the estate of the bankrupt. But there was a right which the trustee held in virtue of his being a trustee, which was a right of indemnity. He could turn that into a right to recover money by making payments to

(1) L. R. 18 Eq. 182. (2) 5 Ex. D. 280, 286.

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the head creditor, and just as much as he paid to the head creditor he could recover from the wife. In other words, the only use of this right to indemnity would be to pass the money on to the head creditor. That is exactly consistent with justice. It would not be right for a trustee to obtain money from this right to be indemnified against payments made to the head creditor when he not only has not made those payments but comes here to say that he does not intend so to do. Therefore I come to the conclusion that, as a general principle, an indemnity like this can be used by the trustee only for the purpose of bringing about payment to the head creditor of the claim against which he is indemnified. In the present case there were very complicated matters before the matter of the present application came into existence, but I think that it can all be summed up by saying that the governors of St. Thomas's Hospital and the trustee united in taking proceedings to get the money from the wife with the deliberate intention that those proceedings should not prejudice the rights of either of the two parties in respect of the money so recovered, and it was their intention—and I think they have loyally acted up to it—that we should decide to whom the money ought ultimately to go. The only difficulty is created by the fact that the governors of St. Thomas's Hospital filed a proof against the estate of the debtor, but I think that this was only done in order to keep all matters open, because the intention of the governors of St. Thomas's Hospital throughout was, I think, to obtain money ultimately from the wife. I think therefore that this ought not to influence us in our decision, and that we must look upon this case as raising the abstract proposition whether a trustee in the position of the respondent can compel the surety to pay the money to him to use it for the general estate when he only pays a dividend to the principal creditor. I have come to the conclusion that that is not good law. I therefore agree that this appeal must be allowed.

BUCKLEY L.J. In my judgment the appellants succeed, and are entitled to the declaration asked for by their notice of motion by way of appeal. The sum in dispute is 520*l.* The appellants, who are the governors of St. Thomas's Hospital, were freeholders

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entitled in reversion expectant on certain leases, and the lessee at the relevant time was Richardson, the husband. Richardson was a trustee for Mrs. Richardson, the wife. The leases came to an end in 1908, and there were then sums due for arrears of rent and for repairs enforceable under the covenants contained in the leases. Richardson, the husband, became bankrupt, and under an order of November 18, 1910, made in the bankruptcy, the governors of St. Thomas's Hospital obtained leave to use the name of the trustee in bankruptcy for the purpose of enforcing against the wife the sum which was due in respect of the rent and arrears, upon terms which included a term that if they should recover any sum from her, either in the name of the trustee or in their own names, they should apply to the Court in bankruptcy to determine whether the sum so recovered should be treated as assets divisible amongst creditors, or should be retained by them on account of the debt and costs due to them from the bankrupt. An action was brought in the joint names of the trustee and the governors of St. Thomas's Hospital against the husband and wife. It was discontinued against the husband and prosecuted against the wife and resulted in a compromise order under which the wife paid 520*l.* The question is how that 520*l.* ought to be disposed of. For brevity I am going to call the creditor (the governors of the hospital) A.; the lessee (the husband) who is entitled to be indemnified B.; and the person (the wife) who is liable to give the indemnity C. When B. became bankrupt in 1910, the right of action which B. had against C. was, I think, property which passed to the trustee in bankruptcy. The only way in which you could say it was not, as it seems to me, would be this: that it was a right of action enforceable by B. only for the benefit of A. If it were, it would be trust property and would not pass to the trustee. But that is not the right way to regard it. It is a right of action in B.'s trustee enforceable for the benefit of B. because it is a right of action whose use will relieve B. and B.'s estate from a debt which ought not to be borne by B., but ought to be borne by C. That is the first step. I think that the right of action vested in the trustee. Then what was it that vested in the trustee? It was a right to indemnity. Indemnity is not necessarily given

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by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay, and, according to my recollection, the judgments which have been pronounced in Courts of Equity upon rights of indemnity have assumed that form. The one that occurs to me is in *Cruse* v. *Paine*. (1) There B. was the legal owner of shares: C. was the cestui que trust of the shares: C. had to indemnify B. The decree was this: "Declare that the defendants are bound to procure the release or discharge of the plaintiff's estate from the calls and let the defendants procure such release or discharge accordingly either by payment of the said calls or otherwise and indemnify his (the plaintiff's) estate against all such costs and charges as aforesaid." Let us work this out. If the sum which the trustee recovers in respect of the right of action (which, I agree, is vested in him) is to be applied for the benefit of the creditors generally, what is the result? Let us suppose that the trustee exercises his right of action and recovers judgment against C. for 520*l.*, and C. satisfies the judgment and B.'s trustee receives the 520*l.* Supposing then B.'s trustee having received the 520*l.* applies it with other money in payment of dividends to the creditors, say 10*s.* in the pound to all creditors of B., A. will receive 10*s.* in the pound like every one else. Subsequently further assets come in. A. of course is entitled to a further dividend, and he calls for a further dividend and receives it. B. can get nothing further from C. because C. has paid everything which he is bound to pay. The result therefore is that B. has not been indemnified. He has had the 520*l.*, but owing to the fact that the sum has not reached its proper destination, namely, the pocket of A., B. or his estate is still liable to A. and can make no further claim against C. Effect is therefore not given to an obligation to indemnify if the sum paid by C. is applied, not in discharge of the obligation due to A., but only partially to that and partially to some other purpose.

That ground seems to me sufficient to dispose of this case. This is an obligation to indemnify. How can effect be given to an obligation to indemnify? Only in one of three ways. If

(1) L. R. 4 Ch. 441.

B. has paid the money to A., he may get it back from C. and may put it into his pocket. If B. has not paid the money to A., but calls on C. to pay the money to A., then if C. pays the money to A., B. is never out of pocket at all. In either of those cases B. is indemnified. But lastly, if B. has not paid the money to A. but calls upon C. to pay the money to him, B., in order that he may pay it to A., then B. is not indemnified if the money is paid, not to A. alone, but to A. and others. According to the view put forward by the trustee in this case B. is not indemnified. The two propositions are perfectly consistent the one with the other, namely, (1.) that the right of action is property vested in the trustee and (2.) that it is a right of action which can only be enforced for giving effect to the contract of indemnity. In that way the estate does get the benefit of the right of action which is vested in the trustee. The trustee having recovered from C. pays A., and thus effect is given to the contract for indemnity. I am not aware of any authority directly in point on this case, but all the cases which have been referred to are perfectly consistent with this view, and in the Stock Exchange cases, of which there have been a good many, I think there are indications, if not decisions, that this is the right view. For these reasons I think that the money recovered from the wife—the 520*l.*—is applicable in paying exclusively that debt against which the trustee is entitled to be indemnified, and therefore that the 520*l.* is payable to the governors of St. Thomas's Hospital.

*Appeal allowed.*

The order of the Court provided as follows: Allow the appeal and discharge the order of Phillimore J. of March 13, 1911, so far as it declares that the balance of 520*l.* therein mentioned after payment thereout of the specified costs forms part of the bankrupt's estate herein divisible amongst his creditors and in lieu thereof declare that after payment therefrom of the taxed costs directed to be paid by the said order together with the costs of the appellants and respondent of and incident to this appeal the balance of the sum of 520*l.* belongs to the appellants and may be retained and applied by them on account of the judgment of 711*l.* 11*s.* 4*d.* which pursuant to the order of the Court of Appeal of December 16, 1909, they recovered against the bankrupt And direct the appellants to withdraw the proof of debt of 711*l.* 11*s.* 4*d.* which they lodged against the bankrupt's estate

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herein on August 6, 1910, but without prejudice to the right of the appellants to lodge such other proof herein as they may be advised.

Solicitors for appellants: *Pennington & Son.*
Solicitors for respondent: *Tarry, Sherlock & King.*

H. B. H.

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[IN THE COURT OF APPEAL.]

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## *In re* A DEBTOR, No. 305 OF 1911.

*Bankruptcy—Bankruptcy Notice—Validity—Demand for Payment to Judgment Creditor or his Solicitor—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 4, *sub-s.* 1 (*g*).

A bankruptcy notice which requires the debtor to pay the judgment debt to the judgment creditors "or their solicitors" and which contains a statement by the solicitors that they are authorized by the creditors to receive payment and to act for them in respect of all matters specified in the notice, is not a bankruptcy notice "requiring the debtor to pay the judgment debt in accordance with the terms of the judgment" within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, and is consequently not a good foundation for a receiving order.

APPEAL from a receiving order made by one of the registrars in bankruptcy.

The debtor was a stockbroker, and the petitioning creditors, Messrs. Kitchin, Aylard & Craddock, were stockjobbers, and both the debtor and the petitioning creditors were members of the London Stock Exchange. On May 3, 1910, the debtor was declared a defaulter, and thereupon his assets vested in the official assignee of the Stock Exchange. The petitioning creditors had transacted business with the debtor on the Stock Exchange, and on April 29, 1910, as the result of these transactions there was due to them from the debtor the sum of 833*l.* 2*s.*

On August 5 the petitioning creditors issued a writ in the King's Bench Division against the debtor to recover this amount, and on August 26 they obtained final judgment under Order XIV. On December 19, 1910, this judgment was amended under an order of the Court of December 16, and the amount was reduced to 781*l.* 0*s.* 4*d.* less 6*s.* 8*d.* costs to defendants under the order of December 16. In the meantime, namely, on August 31, 1910,

Messrs. Kitchin, Aylard & Craddock dissolved partnership. A portion of the amount due in respect of the amended judgment had since been paid, but there still remained due to the petitioning creditors a balance of 611*l.* 13*s.* 1*d.*

On February 11, 1911, Messrs. Spyer & Sons, the solicitors for the petitioning creditors, signed a printed form of request for the issue of a bankruptcy notice against the debtor for this amount. This form was in accordance with Form 5 of the Bankruptcy Forms except that the solicitors added in writing the following clause:—"5. We Spyer & Sons have full authority to receive payment of the above mentioned judgment debt and to act for the said Kitchin Aylard & Craddock in respect of the above mentioned matters."

On the same day they issued a bankruptcy notice against the debtor. The formal parts of the notice were in print and were in accordance with Form 6 of the Bankruptcy Forms, and the printed form was filled in with writing to meet the requirements of the particular case. So far as material the bankruptcy notice was as follows: "Take notice that within seven days after service of this notice on you, excluding the day of such service, you must pay to Kitchin Aylard and Craddock late of 5 Copthall Court in the City of London stockjobbers George William Kitchin and Martin Aylard two of the members of the late firm of Kitchin Aylard & Craddock now carrying on business in co-partnership at 4 Copthall Chambers in the said City and Leopold Radcliffe Craddock one of the members of the said late firm carrying on business in co-partnership under the style of J. B. Kennedy & Co. at Pinners Hall in the said City or to their solicitors Spyer & Sons of 65 London Wall in the said City the sum of 611*l.* 13*s.* 1*d.* claimed by him (*sic*) as being the balance due on a final judgment obtained by them against you in the King's Bench Division of this Court dated 26th August, 1910, whereon execution has not been stayed; or you must secure or compound for the said sum to their satisfaction or the satisfaction of the Court, or you must satisfy the Court that you have a counter-claim, set-off or cross demand against Kitchin Aylard and Craddock which equals or exceeds the sum claimed by them, and which you could not set up in the action in which

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the judgment was obtained." Then on the back of the notice, after the name and address of the solicitors suing out the notice, the following sentence was added in writing: "Spyer & Sons of 65 London Wall in the City of London solicitors suing out this notice certify that they have full authority to receive payment of the balance of the above mentioned judgment and to act for the said Kitchin Aylard and Craddock in respect of all matters specified in the above notice."

On March 8, 1911, Kitchin, Aylard & Craddock presented a petition in bankruptcy against the debtor, the act of bankruptcy alleged being the failure of the debtor to comply with this bankruptcy notice. The debtor opposed the petition on the grounds (1.) that the bankruptcy notice was not in accordance with the judgment and was embarrassing; (2.) that the petitioning creditors ought to have given credit for their share of the undistributed assets in the hands of the official assignee.

The registrar overruled these objections and made a receiving order.

The debtor appealed.

The arguments are reported only on the question of the validity of the bankruptcy notice.

*E. Clayton, K.C.*, and *F. Mellor*, for the appellant. This bankruptcy notice is irregular and embarrassing. A bankruptcy notice which requires payment to the judgment creditors or their solicitors is not a bankruptcy notice requiring payment of the debt "in accordance with the terms of the judgment" within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883. How is the debtor to know that the solicitors have authority to receive payment? Apart from this objection, the bankruptcy notice is embarrassing and it has all the vices which were held fatal to the bankruptcy notice in *In re a Judgment Debtor*, 530 *of* 1908. (1) This notice requires payment to a non-existent firm, and it requires payment to partners of the late firm. That must mean to them all, whereas by the judgment payment to any one of them is all that the law requires.

*Hansell*, for the respondents. Sect. 115 of the Bankruptcy

(1) [1908] 2 K. B. 474.

Act, 1883, as construed by *In re Wenham* (1) shews that a dissolved firm may proceed or be proceeded against in bankruptcy. The firm having obtained judgment the notice was bound to say "pay to the dissolved firm." The notice then proceeds to say who were the members of the firm, and it is clear that the words describing the members of the firm should be read as if they were enclosed in brackets and as descriptive merely. These words of description were inserted for the benefit of the debtor inasmuch as it was futile to direct payment at the offices of the late firm, since the place was shut up. Treating those words as descriptive only, *In re a Judgment Debtor*, 530 *of* 1908 (2) does not apply. Then in order to remove any possible difficulty the debtor is told that he may pay the solicitors on the record. This form of bankruptcy notice was settled by the registrars in 1896 in consequence of *In re Stogdon* (3) and was designed to meet the case of a creditor residing abroad, and the appellant is informed that it was submitted to Vaughan Williams J., the bankruptcy judge at the time. It was not suggested before the registrar that the statement of the solicitors in the bankruptcy notice was unauthorized and the debtor would not be affected by the wrongful assertion of authority by the solicitors. Form 5 of the Appendix of Forms shews that a request for a bankruptcy notice may be made either by the judgment creditor or by his solicitor, and Form 6 shews that the bankruptcy notice may be sued out by the solicitor. The bankruptcy notice must require payment in some manner which is not inconsistent with the judgment and which will not embarrass the debtor. This bankruptcy notice fulfils those conditions, and it makes payment easier for the debtor. The sort of embarrassment which is fatal to a bankruptcy notice is illustrated by *In re Howes* (4), where the judgment and notice did not clearly inform the debtor whom he was to pay.

[Kennedy L.J. *In re Winterbottom* (5) shews that actual embarrassment is not necessary.]

*Hansell* also referred to *Butler* v. *Knight* (6) and *Re Persse.* (7)

*Clayton, K.C.*, in reply, referred to *In re Arkell.* (8)

(1) [1900] 2 Q. B. 698.
(2) [1908] 2 K. B. 474.
(3) [1895] 2 Q. B. 534.
(4) [1892] 2 Q. B. 628.
(5) (1886) 18 Q. B. D. 446.
(6) (1867) L. R. 2 Ex. 109.
(7) (1911) 55 Sol. J. 314.
(8) (1889) 6 Morr. 182.

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The COURT intimated that they would take the opportunity of consulting Vaughan Williams L.J. during the midday adjournment and would give judgment at 2 o'clock.

COZENS-HARDY M.R. We have had an opportunity of consulting Vaughan Williams L.J., whose experience in bankruptcy matters I need not say is very great, and, having considered the case, it now becomes our duty to say whether this bankruptcy notice was a bankruptcy notice such as to justify a receiving order. In my opinion it was not. The question turns upon the effect of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883. [The Master of the Rolls read the clause, and continued.] In the present case an action was commenced by Kitchin, Aylard & Craddock, a firm of stockjobbers on the Stock Exchange, against the debtor, who is himself a member of the Stock Exchange, and in that action a final judgment was obtained for a considerable sum of money which by subsequent payments has been reduced to a sum of 600*l.* or thereabouts. That was a judgment as between the firm of Kitchin, Aylard & Craddock and the debtor. Under the provisions of the Bankruptcy Act there must first of all be a request for the issue of the bankruptcy notice. That request is in Form 5 of the Appendix of Forms. That is a request which may be made by the judgment creditor himself or by a solicitor for the judgment creditor. It contains a request for the bankruptcy notice; it states where the debtor has been or is carrying on business and that there is to be produced at the office the final judgment against the debtor; and then it states that execution on the said judgment has not been stayed. In the present case the request contained the following additional paragraph in ink: [The Master of the Rolls read it.] That was an addition in ink to a document which was signed by Spyer & Sons, a statement by Spyer & Sons, and by no one else, that they Spyer & Sons had authority to receive the payment of the above-mentioned judgment debt and to act for Kitchin, Aylard & Craddock in respect of all the above-mentioned matters. That being the request, the notice is framed in these terms. I should say that since the judgment the firm of Kitchin, Aylard & Craddock has been dissolved, as appears from

the notice itself. [The Master of the Rolls read the provisions in the bankruptcy notice requiring payment to the firm or their solicitors and said that he accepted for the present purpose the suggestion of the respondents' counsel that the words following the name and address of the firm should be deemed to be enclosed in brackets and were merely descriptive, and he continued as follows:] At the back of the notice, which is on a printed form, there is this addition: "Spyer & Sons certify that they have full authority to receive payment of the balance of the above mentioned judgment debt and to act for the said Kitchin Aylard and Craddock in respect of all matters specified in the above notice."

The question is whether that is in any reasonable sense of the word a notice requiring the debtor to pay the judgment debt in accordance with the terms of the judgment. In my opinion it is not. It is idle for a solicitor to say "I have authority to receive this money due to my clients, and you must please pay it to me." That is not in accordance with the judgment at all. That seems to me to be imposing upon the debtor a state of circumstances which he ought not to be called upon to consider. The judgment says "pay to the firm." Payment to any member of the firm would be a good discharge, it being a firm debt, but to say "pay to the solicitors of the firm" who state that they have full authority to receive, and not merely to receive but to compromise and arrange, is what seems to me to be unwarranted by the language of the statute or by the forms, and to be wrong. But we were told by the respondents' counsel, who has been making most careful inquiries in this matter, that in the year 1895, with the sanction and approval of Vaughan Williams J. (as he then was), who was then the bankruptcy judge, a practice was established that a request for a bankruptcy notice and a bankruptcy notice substantially in this form might be issued and ought to be issued in a case where one of several creditors, or, it might be, the sole creditor, was residing out of the jurisdiction. There is no record of any such determination or decision by the learned judge, and, after communication with him, he authorizes me to say that he has no recollection of ever having given any such direction, and, moreover, that his impression is that any

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such direction would be unauthorized and improper. In these circumstances, in my opinion, it only remains for us to say that this bankruptcy notice is not a good foundation for a receiving order, because it directs payment not merely to the firm or to any member of the firm, but also to their solicitors, who simply state in the document that they have authority to receive and make arrangements. Of course, it will not be assumed for a moment that I am suggesting that Spyer & Sons were stating what is not true. That is not the case at all, but nothing turns upon that. This is a matter which is technical beyond almost anything else in proceedings at the present day, and the question is whether a bankruptcy notice can be right which departs so far from the authorized form and from the judgment itself as to say "pay over to me or to a gentleman who says he is my solicitor." In my opinion on that ground the appeal succeeds.

BUCKLEY L.J. As the Master of the Rolls has had an opportunity of consulting Vaughan Williams L.J. I do not propose to deliver any separate judgment in this case. Unassisted my opinion would have been to the contrary of that which has been expressed by the Master of the Rolls; but Vaughan Williams L.J. having advised us in the matter, I do not think that any expression of my opinion in the matter would be of any great weight. I therefore concur in the judgment which my Lord has pronounced.

KENNEDY L.J. I agree with the judgment that the Master of the Rolls has pronounced, and I only desire to add that not only was this a notice for payment to the creditors or to another person, but it was also a notice in the alternative for securing or compounding for the said sum "to their satisfaction," and that in my opinion the objection to the demand for payment applies almost with greater force to the right of the debtor to secure or compound.

*Appeal allowed.*

Solicitors for appellant: *Linklaters, Addison & Brown.*
Solicitors for respondents: *Spyer & Sons.*

H. B. H.

[IN THE COURT OF APPEAL.]

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*June* 20.

## KNAPP *v.* HARVEY.

*Practice—Discovery—Interrogatories for Purpose of ascertaining Names of Opponent's Witnesses.*

Interrogatories put for the mere purpose of obtaining information as to the evidence by which the opposite party intends to prove the facts which he alleges are inadmissible.

In an action brought by the plaintiff to recover damages in respect of personal injuries occasioned to him through being bitten by a dog belonging to the defendant, which was alleged by the plaintiff to have been, to the knowledge of the defendant, accustomed to bite mankind, an order was made that, if the plaintiff intended to give evidence of any specific occasion or occasions on which the dog had bitten persons, he should give particulars thereof, and the plaintiff accordingly gave particulars stating that a person was bitten by the defendant's dog in a certain street in or about June or July, 1908, and another person was bitten by the dog in another street in or about July or August, 1908. The defendant thereupon applied at chambers for leave to administer interrogatories asking the names of the persons alleged in the plaintiff's particulars to have been so bitten. The Master granted the application, and on appeal the judge affirmed his decision :—

*Held* by the Court of Appeal, that the interrogatories were inadmissible on the ground that they were put merely with the object of ascertaining the names of witnesses by whom the plaintiff proposed to establish his case.

Appeal from an order made by Ridley J. at chambers as after mentioned.

The action was brought by the plaintiff, an infant suing by his next friend, to recover damages for personal injuries occasioned to him through being bitten by a dog belonging to the defendant, it being alleged in the statement of claim that "the said dog was of a fierce and mischievous nature, and accustomed to attack and bite mankind, and that the defendant wrongfully kept the said dog well knowing that it was of such fierce and mischievous nature, and so accustomed." The defendant, in his defence, pleaded, among other things, traverses of the above allegations.

The defendant applied for and obtained from a Master

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at chambers an order whereby it was "ordered that, if the plaintiff intends to give evidence in chief of any specific occasion or occasions on which the dog had bitten a man, woman, or child, he do give particulars thereof, and that, if he relies on any specific notice to the defendant of such bite or bites, he do give particulars thereof, otherwise that he be precluded from giving evidence in chief of any such bite or bites, or of such notice, of which he does not give particulars." In pursuance of the before-mentioned order the plaintiff delivered the following particulars:—"(1.) In or about the month of June or July, 1908, the defendant's dog bit a man in Stanford Street, Vauxhall Bridge Road. The defendant was verbally informed of the fact the same day by the person who was bitten by the said dog. (2.) In or about the month of July or August, 1908, the said dog bit a man in Tachbrook Street, Pimlico. The said defendant was verbally informed of the fact on the following day by the person who was bitten by the said dog."

The defendant subsequently applied at chambers for leave to administer to the plaintiff, among others, the following interrogatories:—"(2.) What is the name of the person alleged in your particulars to have been bitten by the said dog in or about the month of June or July, 1908? In which month of the said year was such person bitten? (3.) What is the name of the person alleged in your particulars to have been bitten in or about the month of July or August, 1908? In which month of the said year was such person bitten?" The Master allowed the above-mentioned interrogatories (2.) and (3.), and the plaintiff appealed against so much of his order as ordered that the defendant should be at liberty to interrogate the plaintiff as to the names of the persons alleged in the plaintiff's particulars to have been respectively bitten by the defendant's dog in or about the month of June or July, 1908, and in or about the month of July or August, 1908.

The learned judge affirmed the decision of the Master, but gave leave to appeal.

*P. R. Simner*, for the plaintiff. The object of these interrogatories clearly is to ascertain the names of persons who will be

called as witnesses for the plaintiff. Interrogatories are not admissible for such a purpose.

[He was then stopped.]

*H. M. Giveen*, for the defendant. It may be admitted that interrogatories cannot be put merely for the purpose of getting the names of the opposite party's witnesses, but these are not such interrogatories. The defendant is entitled to interrogate the plaintiff as to any facts material to the issues raised in the action, even although those facts may not be directly in issue, and it is no objection that the answering of the interrogatory may incidentally involve the disclosure of the name of a witness who will be called by the party interrogated: *Marriott* v. *Chamberlain*. (1) No doubt the fact directly in issue here is the character of the dog, as being accustomed to bite mankind, and not whether he bit a particular person, but the character of the dog is shewn by instances of his biting people, and therefore the question whether he bit a particular person other than the plaintiff is clearly material to the issue. The plaintiff has given particulars of two occasions on which he alleges that the dog bit persons. The plaintiff, having condescended on the facts on which he relies in his particulars, must state the substantial circumstances of them: see per Lord Esher M.R. in *Marriott* v. *Chamberlain*. (2) It is submitted that the defendant is entitled to have sufficiently definite information for the purpose of identifying the occasions on which the dog is said to have bitten persons, in order that he may know how to meet the plaintiff's case.

[FLETCHER MOULTON L.J. Are not these matters within the defendant's own knowledge?]

They would not be so, if the persons who allege that they have been bitten are not speaking the truth. The defendant is entitled to know the names of the persons alleged in the particulars to have been bitten, in order that he may make inquiries about them, and that he may know what he has to meet, and to what his evidence must be directed. Unless he knows the name of the person alleged to have been bitten, he has no opportunity of testing the matter, and finding out whether the person who alleges that he was bitten is a person worthy of belief. The

(1) (1886) 17 Q. B. D. 154, 163. (2) 17 Q. B. D. 162.

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identity of the persons alleged to have been bitten is a substantial part of the material facts. If the defendant does not know their names, he may bring witnesses to prove that A. and B. were not bitten, and find that C. and D. are called to say that they were bitten.

[VAUGHAN WILLIAMS L.J. The mere fact that these persons were bitten, assuming that they were, does not affect the defendant unless he knew of it.]

There are two issues; one is whether the dog was accustomed to bite mankind, the other is whether the defendant knew that to be so. The facts with regard to these occasions mentioned in the particulars are clearly material to the first issue. Suppose, in an action of libel for writing of the plaintiff that he was a swindler, the defendant justified: clearly the plaintiff could interrogate the defendant as to the names of the persons with regard to whom the defendant alleged that they had been swindled by the plaintiff, although such persons would be the witnesses whom the defendant was going to call at the trial.

[BUCKLEY L.J. referred to *Nash* v. *Layton*. (1)]

There the interrogatories appear to have been of a fishing character for the purpose of discovering materials to support a claim. [He also cited *Humphries & Co.* v. *Taylor Drug Co.* (2)]

*P. R. Simner*, for the plaintiff, was not called upon to reply.

VAUGHAN WILLIAMS L.J. In my opinion this appeal must be allowed. In regard to the admissibility of interrogatories there is always great difficulty in laying down any absolutely hard and fast rules; but the power of administering interrogatories, and, I may say, of obtaining discovery generally, is a power which is very apt to be abused, and, in consequence, several rules of practice have been laid down on the subject as rules which will be generally followed. As a rule the Court will not in such cases interfere with the exercise of his discretion by the judge at chambers, whether in allowing or in disallowing interrogatories, unless there is some strong reason in point of principle for so doing, as, for instance, where what the judge has done appears to the Court to involve a violation of some rule which

(1) [1911] 2 Ch. 71. (2) (1888) 39 Ch. D. 693.

has been so often recognized as to have become an unwritten law of practice on the subject; and I am anxious to preface my judgment in this case by saying that, in allowing this appeal, we are not intending in any way to depart from that rule.

Now we start in this case with the admission very properly made by the defendant's counsel that, generally speaking, it is not admissible for a litigant to ask in an interrogatory the names of persons who are going to be his opponent's witnesses. In this case an order for particulars was applied for, and obtained, by the defendant, and particulars were accordingly given by the plaintiff. Those particulars are not, as it appears to me, by way of supplement to the statement of claim, as particulars sometimes are, for instance, in a case where fraud is alleged generally, and particulars of the fraud are ordered to be given. I think they are particulars given in order to prevent the party who obtained the order for them from being taken by surprise at the trial. I am far from saying that, because the defendant obtained an order for these particulars, it necessarily follows that he is not also entitled to an order for interrogatories, but I think that the fact that the defendant has obtained these particulars ought to be taken into consideration in determining the question which we have to consider, namely, whether these interrogatories are really put for the purpose of obtaining the names of the plaintiff's witnesses, or are put for the purpose of better understanding the circumstances of the case which the plaintiff is going to set up. In my opinion we ought to bear these particulars in mind in determining that question, because they seem to me to shew that the defendant has already obtained by means of them just that sort of subject-matter of information the obtaining of which in some cases may prevent an interrogatory that involves the giving the names of witnesses from being an interrogatory merely for the purpose of obtaining the names of witnesses. I ask myself, in what sense is the obtaining of the names of these persons, who will presumably be called as witnesses for the plaintiff, material? It is, in my judgment, plain that the identity of these persons is not material to the actual issues in the action. The only materiality of their identity appears to me to be that the defendant wants their names in order that he

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may make inquiries about them, and, if necessary, may interview them. Being of opinion that, having regard to the information already given by the particulars, the sole object of putting these interrogatories is to get the names of the plaintiff's witnesses, I am not disposed in the present case to depart from the rule that it is not admissible to put interrogatories asking the names of persons for the mere purpose of getting the names of the witnesses whom the other party is going to call at the trial. It is admitted that there is a limitation to the right of administering interrogatories of this kind. In my opinion, where a party to an action is asking for the names of persons who will be witnesses for his opponent, it lies on him to shew that it is necessary for him to ask their names for the purpose of establishing some material fact, not necessarily a fact directly in issue, but some fact that is material to the proof of his case. In this case I think the names of these persons are asked for merely because they may be witnesses for the plaintiff, and not in order to obtain information as to the specific occasions on which the dog is alleged to have bitten people. Under these circumstances I think that the interrogatories should be disallowed.

FLETCHER MOULTON L.J. I am of the same opinion. The question of the propriety of the order for particulars in this case is not before us, but, assuming it to have been a proper order, I do not think that it can be allowed to extend the right of the defendant to discovery by means of interrogatories. The statement of claim alleges that the defendant's dog was of a fierce and mischievous nature, and accustomed to bite mankind, and that the defendant kept it, well knowing that such was the case. The burden of proving that issue lies on the plaintiff, and the defendant is not entitled to know before the trial by what evidence the plaintiff proposes to support that burden. The defendant is not entitled to know whether the plaintiff is going to call any, and, if so, what person or persons, to say that he or they has or have been bitten by the defendant's dog. One danger of allowing a litigant to obtain information as to the evidence upon which his opponent intends to rely is that he may in this way find out, not that his opponent's case is untrue, but that his opponent is not

aware of some awkward fact or facts, and he may for that reason be emboldened to persevere with an unrighteous defence or claim, as the case may be. The defendant is not entitled to know how the plaintiff intends to prove his case. He has obtained some information on the point under the order for particulars of specific occasions on which the dog is alleged by the plaintiff to have bitten persons; but, as I have said, that order cannot have the effect of increasing his right to discovery. These interrogatories appear to me to be directed to the question how the plaintiff proposes to prove his case, which is not a legitimate subject of interrogatories.

BUCKLEY L.J. The plaintiff alleges in his statement of claim that the defendant kept a dog of a particular character and quality, and that the defendant knew that the dog was of that character and quality, namely, a dog "of a fierce and mischievous nature, and accustomed to bite mankind." A fact in issue, therefore, which has to be proved by the plaintiff, is that the dog was of that character and quality. If the dog was accustomed to bite mankind, it must have done so on more than one occasion. In this state of things, the defendant obtained an order for particulars, namely, an order that, "if the plaintiff intends to give evidence in chief of any specific occasion or occasions on which the dog had bitten a man, woman, or child, he do give particulars thereof." I do not say that this order was wrong. The question whether it was right or wrong is not before us; it must be taken for the present purpose to have been right. That order is an order to give to the defendant information to a certain limited extent as to the facts of which the plaintiff proposes to give evidence at the trial. One of the facts in issue, to be proved by the plaintiff, is, as I have said, that the defendant's dog was of a fierce and mischievous nature, and accustomed to bite mankind. The plaintiff proposes to prove that by proving certain acts which he alleges to have been done by the dog. It may be that the defendant was entitled to information for the purpose of identifying those acts by condescending upon the occasions when they occurred, but he wants more than that; he desires to know whom the plaintiff is going to call for the purpose of proving

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those acts. He therefore asks in his interrogatories the names of the persons alleged in the plaintiff's particulars to have been bitten by the defendant's dog. These persons will presumably be called by the plaintiff. He is therefore asking the names of some of the plaintiff's witnesses. The purpose of interrogatories is not to enable a litigant to come into Court knowing how his opponent is going to prove his case. He is not entitled to ask what his opponent's evidence is going to be. The argument for the defendant really comes to this, that, if he knew in advance whom the plaintiff was going to call as witnesses, he would be in a better position to meet their evidence. That is an inadmissible contention. Directly the conclusion is reached that the object of the interrogatories is to find out what the evidence adduced by the plaintiff in support of his case is going to be, or what witnesses he intends to call, it follows that they cannot be supported. An order for particulars, for the purpose of enabling the defendant to identify the occasions on which the plaintiff alleges that the defendant's dog bit persons, may be, and I am disposed to think is, justifiable; but, in order to identify those occasions, it is not necessary that the defendant should know the names of the witnesses for the plaintiff who are going to speak to them. It is not a ground for allowing an interrogatory of this kind that, if it were allowed, the defendant would know better how to meet the plaintiff's evidence. This case really involves a point very similar to that decided in *Nash* v. *Layton*. (1)

On these grounds I agree that the appeal must be allowed.

*Appeal allowed.*

Solicitors for plaintiff: *Arnold & Cubison.*
Solicitors for defendant: *Langford & Redfern.*

(1) [1911] 2 Ch. 71.

E. L.

[IN THE COURT OF APPEAL.]

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*May* 25.

## CAROLAN *v.* HARRINGTON & SON.

*Employer and Workman—Compensation—Death—Cause of Death—Conflict of Medical Evidence—Reference to Medical Referee—Jurisdiction—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., par.* 15.

The power conferred upon a county court judge by Sched. II., par. 15, of the Workmen's Compensation Act, 1906, to refer to a medical referee extends to a case where death has resulted from the injury in respect of which compensation is claimed.

APPEAL from an award of the judge of the Liverpool County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On October 11, 1910, Carolan, a carter in the employment of the respondents, slipped while descending from a van belonging to the respondents and broke his leg. He had had some drink at the time. He was taken to the hospital. He made good progress for a week and then began to shew signs of dulness, and he died on October 22 from cerebral thrombosis. His widow applied for compensation. Upon the hearing, the surgeon who attended him at the hospital was called on behalf of the applicant and stated his opinion that the thrombosis was caused or accelerated by the accident and by the man's confinement to bed in the hospital, and this opinion was confirmed by another medical man. On the other hand two eminent surgeons called on behalf of the respondents were of the contrary opinion. In this conflict of evidence the county court judge, without any objection being raised on the part of the applicant, referred it to the medical referee to report upon the question whether the death was caused or accelerated by the accident. The medical referee reported that the applicant had failed to prove that the certified cause of death, cerebral thrombosis, was caused or accelerated by the accident, and that the death was not due to injury sustained by the deceased in the course of his employment.

The county court judge said that, having regard to the evidence given before him and to the report of the medical referee, he found that the applicant had not discharged the onus of proving

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to his satisfaction that the deceased's death was caused by an injury arising out of and in the course of his employment, and he made an award in favour of the respondents.

The applicant appealed.

*Cuthbert Smith* and *Newman*, for the appellant. The county court judge has no jurisdiction to refer any question to a medical referee in the case of the death of the injured workman. The Act contains no provision applicable to that case. Sched. II., par. 15, does not apply because the power there conferred is "subject to regulations made by the Secretary of State and the Treasury," and both the Workmen's Compensation Rules and the Treasury Regulations contemplate only the case of a workman who can be personally examined by the medical referee. The intention of the Legislature was that the medical referee should see the man himself and settle the matter in a practical manner. Rule 53 of the Workmen's Compensation Rules provides by clause 1 that "subject to and in accordance with regulations made by the Secretary of State and the Treasury under paragraph 15 of the Second Schedule to the Act" the judge may refer any question to a medical referee, and by clause 2 that where any matter is referred as aforesaid "the judge may, subject to and in accordance with such regulations, order the injured workman to submit himself for examination by the medical referee," and that it shall be the duty of the workman to submit himself accordingly. The Treasury Regulations also and the forms annexed thereto shew that the personal examination of the man by the medical referee is an essential condition: see Regulations 22, 27, and Forms F, G, H, L. They do not deal with the case of a dead man. The event of death was not within the contemplation of the Treasury, otherwise the Regulations would have contained some provision for exhumation. In the case of a dead man the proper course is for the judge, if he needs further assistance, to call in an assessor.

[COZENS-HARDY M.R. Paragraph 15 of Sched. II. is wide enough to cover this case, and there is no reason for saying that the wide words of the paragraph are to be cut down by the Treasury Regulations: see an unreported observation made by

Lord Halsbury in the course of the argument in *Powell* v. *Main Colliery Co.* (1), cited in Parsons and Allen's Workmen's Compensation Act, 4th ed., p. 190.]

*Rigby Swift*, for the respondents, was not called upon.

COZENS-HARDY M.R. This appeal raises rather a curious point. The workman on October 11 met with an undoubted accident. Probably he was the worse for drink at the time, but he fell whilst getting off a van and broke his leg. He was taken to the hospital. He went on improving for several days, but then a change took place and he died on October 22. The hospital doctor who attended him certified that death was due to cerebral thrombosis. The dependants made a claim for compensation under the Act. In support of the claim the hospital doctor who saw the deceased, and who I assume was a perfectly competent man, gave evidence that the death was caused or at least accelerated by the accident. Two other doctors of great distinction—I am not in the least desirous of weighing the medical evidence—but two doctors of high position said that so far from the accident causing or accelerating his death his treatment in the hospital would be likely to prevent the effects of the inherent disease from which he was suffering, and they thought that his death was in no way attributable to the accident. The respondents' counsel contended, that the applicant had not discharged the onus which was upon her, and the judge then adjourned the case till January 16, 1911, and referred the matter to the medical referee. No objection was taken by the representative of the dependants to this course, and, although I do not decide the case upon this point, I should have some hesitation in saying that an adult litigant—and this is an adult litigant—who, when the judge proposes to refer the matter to the medical referee, says nothing, but allows the reference to proceed, can raise the objection, after the medical referee has made an adverse report, that the judge had no jurisdiction to refer to the medical referee. It must not be supposed that in any future case I should allow a litigant in such a position to take a point such as this, which after all is a

(1) [1900] A. C. 366.

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highly technical point. The objection made to the award is this. The county court judge having regard to the evidence and to the report of the medical referee found that the applicant had not discharged the onus of proving that the deceased's death was caused by injury arising out of and in the course of his employment. It has been urged that he had no jurisdiction to consult a medical referee or to refer to him at all in the case of a dead man. I turn to the Act, of which the schedules are of course a part. Sched. II., par. 15, says "Any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee for report any matter which seems material to any question arising in the arbitration." It is perfectly plain that this was a question arising in the arbitration; it was the vital question in the arbitration; it is also clear that it seemed to the learned judge to be a matter material to a question arising in the arbitration. But it is said that the only jurisdiction to submit any question to a medical referee is where the workman is alive, and that on any question arising between the dependants of a deceased workman and the employer there is no power to submit the matter to the medical referee. That argument is based on this, that the regulations as to medical referees made by the Secretary of State and the Treasury and the Workmen's Compensation Rules and the Forms all presuppose that the medical referee (whether the judge has made an order or not that the man shall submit himself for examination) may see the man himself and examine him. But suppose that every one of the Treasury Regulations and the Rules contemplates only the case of a living workman, I ask myself what authority have those Regulations and Rules to limit the generality of the words of the Act. I know of no such authority. If there are no regulations and no rules which fit the case, then it seems to me that the power of the judge to submit the case to a medical referee is not in any way fettered by the Rules and Regulations. In short, the jurisdiction which Sched. II., par. 15, has given to the judge is not one which we ought to curtail or cut down by adding to par. 15 the qualification "In case the workman is alive and an order can be made that he shall submit himself to

examination by the medical referee." I decline to curtail the jurisdiction in that way, and I base my decision upon the plain language of par. 15. In my opinion this appeal should be dismissed.

BUCKLEY L.J. The matter for decision in this case is to my mind concluded on reading Sched. II., par. 15. The contention of the appellant upon the only matter on which we have to give judgment is that inasmuch as the injured man is dead the judge had no power to refer the matter to a medical referee to report. To my mind the plain words of Sched. II., par. 15, shew that this is an impossible argument. Those words state that the judge may do a particular act, but that in doing that act he shall be controlled by regulations made by the Secretary of State and the Treasury. It is said that the regulations which have been made apply exclusively to the case of a living man, and I will assume that in favour of the appellant. Be it so. There are then no regulations addressed to the case of a dead man. Then what is the effect of par. 15? The effect is that the judge may do the act uncontrolled by regulations. It is said that the effect is that the judge may not do the act at all. I fail to follow that argument. To my mind the effect is exactly the contrary. I agree that this appeal should be dismissed.

KENNEDY L.J. I agree.

*Appeal dismissed.*

Solicitors for appellant: *Helder, Roberts & Co., for J. A. Behn, Liverpool.*

Solicitors for respondents: *Pritchard & Co., for Richardson Marsh & Co., Liverpool.*

H. B. H.

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*June* 1.

[IN THE COURT OF APPEAL.]

## CORY BROTHERS & CO., LIMITED *v.* HUGHES.

*Employer and Workman—Compensation—Agreement—Review—Termination—Partial Incapacity—Return to Work—Evidence—Burden of Proof—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., par.* 12.

A collier, by agreement with his employers, received compensation for over two years in respect of an accident which resulted in an injury to his hand. His employers then found him light work at the colliery at his old wages, first as a watchman and afterwards as a signalman. The latter work, which involved climbing up a high hill, the man gave up owing to heart disease, and he then obtained registration of the agreement for compensation. Upon an application by the employers for a review and termination of the weekly payments it was proved (1.) that the heart disease was not due to the accident; (2.) that the man's hand was useless for any ordinary line of work in the labour market:—

*Held*, that the employers had not discharged the onus which lay upon them of proving such a change of circumstances as to justify a termination of the weekly payments.

Appeal from an award of the judge of the Neath County Court sitting as arbitrator under the Workmen's Compensation Act, 1897.

On January 31, 1906, the respondent, the workman, met with an accident at the applicants' colliery whereby he injured his right hand. He had previously injured his left hand and was at the date of the accident practically a one-handed man. The applicants admitted liability and paid the respondent compensation at the rate of 12*s.* 1*d.* per week from February 14, 1906, to August 10, 1908. They then found him light work either at his old rate of wages, or at a slightly increased rate. From August, 1908, to August, 1909, they employed him as a watchman on the screens. This work was in the valley and the respondent was able to do it. Then in August, 1909, when the Eight Hours Act came into force, they employed him at the pit's bottom as a signalman. This work consisted merely in touching a wire and involved no exertion. But in order to reach the work the respondent had to walk up a high hill to the colliery and then go underground. He worked intermittently at this job until April 23, 1910, when he ceased working as he was unable to

walk up the hill owing to heart disease. In January, 1911, he obtained registration of a verbal agreement come to on February 14, 1906, between the respondent and the applicants to the effect, as stated in the memorandum, that the applicants agreed to pay the respondent and the respondent agreed to accept 12*s.* 1*d.* per week as compensation under the Workmen's Compensation Act, 1897, as from February 14, 1906, and during the incapacity of the respondent. The applicants immediately applied for termination of the weekly payments, or, in the alternative, diminution to 1*d.* per week, as and from April 23, 1910 (the date when the respondent ceased working), upon the ground that as and from that date the respondent had not been incapacitated from performing work at his old rate of wages as a result of his injuries, and that he had prior to that date recovered from the effects of his injuries and had not been prevented by reason thereof from continuing at the work upon which he was then engaged at his former rate of wages. The respondent by his answer alleged that he was still suffering from the effects of the accident and that he was wholly incapacitated from following his employment. At the hearing the doctors called on behalf of the applicants stated that the respondent's hand had healed as far as it ever would, but that it was useless except for some special form of light work, and that he was suffering from heart disease which rendered it dangerous for him either to walk up the hill in question or to work underground, though he could possibly do some very light work on the surface; but there was a conflict of medical opinion upon the question whether the heart disease was caused by the accident. The respondent was also called and stated that he was quite willing to do what light work he could if the applicants would find him work in the valley. The county court judge referred the matter to the medical referee upon the question whether the heart disease was or was not the result of the accident. The medical referee reported that in his opinion the heart disease from which the respondent was suffering was not the result of the accident, and he added that in his opinion it was, humanly speaking, a certainty that the heart disease was in existence long before the accident.

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The county court judge found that the heart disease was not caused by the accident in whole or in part, and he awarded the respondent 10s. a week compensation from April 23, 1910.

The applicants appealed.

*J. Sankey, K.C.*, and *A. Parsons*, for the appellants. In this case the incapacity of the workman to earn wages is not the result of the injury, but is due to heart disease. He is not entitled to compensation: *Merry & Cunningham, Ld.* v. *Black* (1); *Hill* v. *Ocean Coal Co., Ld.* (2) Under the Act of 1897, which applies to this case, the appellants could not have prevented this agreement being recorded on the ground that owing to altered circumstances the respondent had ceased to be entitled to compensation: *Blake* v. *Midland Ry. Co.* (3) Par. 9 (*b*) of Sched. II. of the Act of 1906 is new and was no doubt inserted to remedy that defect.

[KENNEDY L.J. referred to *Charing Cross, Euston and Hampstead Ry. Co.* v. *Boots.* (4)]

The appellants took the only course open to them under the old Act and applied for an immediate review as from the date when the respondent gave up work.

It would be dangerous to hold that after an agreement is recorded the burden of proving that the workman is capable of resuming his old work should be always on the employer. Prima facie the employer discharges that burden when he proves, first, that he has taken the man back to work at his old or a higher rate of wages, and, secondly, that any incapacity under which the man then was was due to a cause unconnected with the accident. Proof of these facts is sufficient to shift the onus on to the workman, and in this case the judge ought to have terminated the compensation.

*C. A. Russell, K.C.*, and *F. H. Gaskell*, for the respondent. To succeed, the appellants must assert that as a matter of law the judge was bound either to terminate the compensation or to reduce it to a nominal amount, because the question of quantum is not subject-matter for appeal. But that cannot be asserted

(1) (1909) 2 B. W. C. C. 372.
(2) (1909) 3 B. W. C. C. 29.
(3) [1904] 1 K. B. 503.
(4) [1909] 2 K. B. 640.

here in the face of the medical evidence which shews that the respondent's hand is useless except for some special class of light work. This case falls exactly within the illustration put by Fletcher Moulton L.J. in *Cardiff Corporation* v. *Hall*. (1) The effect of the accident is to render the respondent incapable of ordinary work in any well-known branch of the labour market. It not being possible to allege that the incapacity had ceased, prima facie the respondent's right is to payment of full compensation, and it is for the appellants to shew some reason why that should not be paid. They do not say that the respondent had some reasonable chance of obtaining employment as signalman and watchman; all they say is that they offered him some particular work, which may well have been done out of charity. That is not enough. This is not a case like *Hill* v. *Ocean Coal Co., Ld.* (2), where a man has refused work which he ought to have taken, and therefore it cannot be said that the respondent is out of work owing to his own misconduct. There being here clear proof of partial incapacity for work resulting from the injury, it is for the appellants to shew that in spite of that partial incapacity there was no loss of wages due to that incapacity.

*J. Sankey, K.C.*, replied.

COZENS-HARDY M.R. This appeal has been extremely well argued and we are indebted to counsel for the assistance they have afforded us. Having listened to the arguments I have arrived at the conclusion that the appeal fails and that the decision of the learned county court judge must stand. The case in some respects is not uncommon. The man met with an accident in 1906, the effects of which are still obviously existent. One of his hands is no longer a hand available for any ordinary kind of work. It is not necessary to consider the extent of the mutilation, but the hand is no longer available for use under ordinary conditions. The employers admitted their liability under the Act. They paid half wages, 12*s.* 1*d.* a week, for a considerable time—about two years—and then they did what employers usually do and I hope will continue to do, endeavoured

(1) [1911] 1 K. B. 1009, at p. 1020. (2) 3 B. W. C. C. 29.

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to find some sort of light work which this injured man could do. They took him back at his old rate of wages. From August, 1908, till August, 1909, they employed him as a watchman. Then they gave him work as a signalman. Both these occupations were light work and did not require any manual labour worth mentioning. The signal work I understand was nothing more than touching with a stick some indicator which worked the signal. But in April, 1910, he ceased working, not for misconduct or through any fault of his own, but because his work as a signalman involved his going up a hill of considerable height to the mine, and by reason of the condition of his heart that was a risk which he quite justifiably was unwilling to bear. He left the work under these circumstances. In June he asked for compensation 12*s.* 1*d.* The doctors examined him on three occasions, and on the balance of evidence the conclusion arrived at was that the heart disease from which the man was suffering was not caused by the accident. I assume that to be correct. In December he applied to register the agreement which in effect was implied from the continuous payment of compensation. The agreement which was recorded was in these terms. [The Master of the Rolls read it.] As soon as that agreement was recorded, the employers applied to terminate the agreement as and from April 23, 1910, that is, the date when the man left their employment, and the workman put in an answer. The matter came before the learned county court judge, who heard the medical evidence, with the result that he declined to terminate the compensation, in which phrase I include for the present purpose reduction to 1*d.* a week, but he reduced the amount from 12*s.* 1*d.* to 10*s.* The employers appealed. Their counsel could not of course contest that if the workman is in a position to claim compensation other than 1*d.* a week, which for the present purpose is equivalent to saying he is not entitled to compensation at all, it is not subject-matter of appeal that 10*s.* a week is too much. Quantum is for the county court judge. The case was argued here on the only ground on which it could be put by the employers, namely, that it was the duty of the county court judge as a matter of law to say that the man was not now under any incapacity by reason of an accident arising out of and in the course of his employment. They seek to prove that as

follows: They say "We gave him work and he left it. The heart disease which was the cause of his giving up work existed at the date of the accident." That is quite true; and then they seek to make out, as a logical consequence of that, that since April, 1910, the man had not been suffering any pecuniary loss by reason of any incapacity arising from the accident, because he would have been equally unable to work in April, 1910, if there had been no accident at all. To my mind that is not the right way of approaching this case. One must remember the peculiar provisions of the Act and the policy of the Act. The Act provides that a workman is entitled to compensation for an injury from an accident arising out of and in the course of the employment—and here it is admitted that this was an injury within the meaning of that provision. The policy of the Act is this. The workman may make an agreement with his employer for the amount of compensation, or, if the parties do not agree, he may apply for and obtain an award. If the parties agree the agreement may be recorded. The agreement when recorded has the same operation and effect for every material purpose to-day as an award made in the same terms. Now both under the agreement and under the award there is an express power given to either party to review the amount of compensation, which may be either increased or diminished or terminated. The employer may say "I am now paying you too much"; the man may say "You are now paying me too little"; or the employer may say "I ought now to pay you nothing at all." But whoever makes that application is the person on whom the burden of proof lies. Here it is to my mind impossible to escape from the conclusion that the burden is on the employers to satisfy the Court that the man at this moment is not under any incapacity by reason of the accident which admittedly befell him. But then it is said that the moment the employers shew that since the accident the man was earning wages equal to or greater than his old wages that burden is absolutely discharged, and there is nothing further to be done by the county court judge than to say that it is now for the workman affirmatively to prove that there is to-day a continued incapacity due to the accident. I am not prepared to assent to that view. In my opinion the judge must

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apply his ordinary common sense to the facts of the case and say, "Here is a man with an obvious permanent physical injury. His hand is physically disabled. Can I as a reasonable man come to the conclusion that he is under no incapacity to earn wages by reason of the fact that his employers, from motives of kindness to the man but also from motives of self-interest, have found him a sort of odd job not connected with his original work, not work for which there is any wide general demand, but an odd job of the kind which at most collieries is given to men in his unfortunate position?" Is that sufficient to outweigh the evidence of the eye of the judge when he looks at the man and the evidence of the doctors, who agree that he is incapacitated from ordinary work? I entirely decline to accept that view. It would be extremely dangerous for us to say that the obligation which the Act imposes on employers who seek to review an agreement to prove affirmatively to the satisfaction of the Court that there is ground for a reduction or termination of the weekly payment is completely satisfied by shewing that the man was taken back by his own employers to do this light work for a considerable time. It may well be that if his employers had offered him work on the level the man might be now ready and willing to accept such work. But I cannot bring myself to doubt that the man is disabled in the labour market by reason of the accident from earning wages which even with his bad heart he might otherwise have been earning at the present moment. If that be so—and I gather that this was the view of the learned county court judge—then there is an end of the appeal. The learned county court judge reduced the compensation from 12*s.* 1*d.* to 10*s.*, and, although I do not see on what ground he made that reduction, it is clear that he was entitled to come to the conclusion that the employers had satisfied him that some reduction was proper, and we cannot interfere with that. I have no reason to think that he was wrong in that conclusion. The appeal will be dismissed with the usual consequences.

BUCKLEY L.J. I agree. The contention of the employers may be stated thus: "This man was injured in 1906. For a couple of

years afterwards we employed him at the same wages as before. This is evidence that his wage-earning capacity was not reduced. He could be holding that employment still but for a fact which had no relation to the accident, namely, heart disease. He could not go uphill to his work owing to the condition of his heart. He lost his work by reason of that disease. Therefore it follows that, so far as the accident is concerned, the man's earning capacity is the same as before he was injured." I fail to follow the sequence of ideas. It may be that it is the same as before or that it is not. The fact is not proved. What is proved is that the hand is healed, as far as it ever will be, but that he could not use it for ordinary work as a collier. The facts only come to this, that under circumstances which we have to weigh, and which are that his employers found him certain light work, he did for a time get the same wages as before. It does not follow that his wage-earning capacity is the same as before.

KENNEDY L.J. I agree. Practically the question is one of law, as indeed it must be coming from a county court judge for our review, namely, whether or not the judge was justified in awarding anything beyond a nominal sum by way of compensation to this workman. The main point raised on behalf of the appellants was that, upon its being shewn that this workman for some time at the full rate of wages—as far as rate is concerned—had been working for his employers at light work, some further evidence to destroy the inference to be drawn from that fact ought to have been placed before the learned county court judge before he could make an award of any substantial amount in favour of the workman. I dissent. It seems to me that the fact that the man gave up this light work by reason of heart disease preventing his going uphill is not a fact which precluded the county court judge without further evidence from making the award he did. There remained the injured man, a person who by an accident arising out of and in the course of his employment had a right to compensation under the Act for any loss of earning capacity occasioned thereby. It stands to reason, as it seems to me, that although he might have been able to obtain from his employers, either from charity or from good will, some

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other kind of light work to which the injured limb presented no impediment, and might in that work have been earning the same wages as before, he was still by reason of the accident a worse man for earning wages in the ordinary labour market. It seems to me unreasonable to say that the county court judge, in the absence of formal evidence, must shut his eyes to the fact that a man without the use of his hand, such as this man was, was at the time of the hearing of this application prima facie unable to earn anything like full wages, and also to the fact that that inability was an inability which would come to any man who suffered from such an accident. Test it in this way. Suppose for a moment that the heart disease, which was not due to the accident, had come upon him without the accident. Assume that he had had no accident to his hand, but while working in this colliery had been prevented from continuing his work, which involved an up-hill climb, by reason of his heart's condition. Compare his condition in that state of things with his present condition. He has by reason of the heart disease, for which the employers are not responsible, been deprived of the limited wage-earning capacity left him by the accident, for which they are responsible. Can any one doubt that his position is such as to render it, if not impossible, at least highly improbable that he should be able to earn wages as a workman in any ordinary capacity. On the other hand, if he were an uninjured man there would obviously be open to him many occupations on level ground in which he would still get an opportunity of earning wages. In my opinion the county court judge was clearly right in the view which he took that the particular cessation of work being due to heart disease in no way affects the fact that the man is suffering from an incapacity from which he would not have suffered if he had not been crippled by the accident which happened to him in his employers' service. I am therefore of opinion that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors for appellants: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Cuthbertson & Powell, Neath.*

H. B. H.

[IN THE COURT OF APPEAL.]

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1911

*May* 29, 30; *June* 2.

## HARDING *v.* THE BRYNDDU COLLIERY COMPANY, LIMITED.

*Employer and Workman—Compensation—Sphere of Employment—Accident arising "out of" the Employment—Serious and wilful Misconduct—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-ss.* 1, 2 (*c*).

H., a collier, was employed to drill a hole into a stall below to let out an accumulation of gas; the entrance to the stall from below had been blocked with cross boards to shew that it was unsafe in accordance with the Colliery Special Rules. In defiance of these rules and in breach of an express order by the overlooker, H. entered the stall from below to ascertain the direction of the drill, with the result that he was suffocated by the gas:—

*Held* (Buckley L.J. dissenting), that the accident arose "out of" the employment, and that H.'s dependants were entitled to compensation.

Appeal against the award of the judge of the Bridgend County Court upon a claim for compensation under the Workmen's Compensation Act, 1906.

The question raised by this appeal was whether the wilful disobedience of an order not to enter a dangerous working so far took that place out of the sphere of the workman's employment that the accident could be held not to have arisen "out of" the employment.

The deceased man Harding was employed as a collier by the defendant colliery company.

In November last, Harding was employed with others hewing coal on a somewhat steep slope which was worked upwards; a good deal of gas had collected in this working (which was called the "top hole"); in order to get rid of this gas and thus enable the coal to be safely worked, Harding and another man named Henson were taken away from their ordinary work and employed at so much an hour to work in a "bogey"—a passage cut

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through the seam above the "top hole"—in order to drill a hole from above into the "top hole" to let out the accumulation of gas.

The entrance to the "top hole" from below had been blocked with cross boards, to shew that it was unsafe for any one to enter, in accordance with the Colliery Special Rules made pursuant to the Coal Mines Regulation Act, 1887, by which all colliers and others were expressly forbidden to enter any working so blocked without leave or order of the fireman or other superior officer. Harding and his mate after some days' labour had worked the drill about five feet into the ground twice, without getting into the "top hole," and he thereupon asked a fireman or overlooker if he might go into the "top hole" to ascertain from the blows on the drill above, and by tapping on the roof from below, whether the drill was being driven in the right direction. The fireman told Harding he was not to go as the "top hole" was unsafe.

Notwithstanding this order, Harding went round and entered the "top hole" from below; he was heard by his mate above tapping the roof with a mandril handle, and then all sounds ceased; on his mate going round, Harding was discovered some six feet up the working suffocated by the gas.

On a claim for compensation by Harding's dependants, the county court judge made an award in their favour for 300*l.*, being of opinion that though Harding had been guilty of serious and wilful misconduct in going into the "top hole" his dependants were nevertheless entitled to an award under the Act.

The employers appealed. The appeal was heard on May 29 and 30.

*C. A. Russell, K.C.*, and *Harold Morris*, for the appellants. The accident cannot be considered to have arisen "out of" the employment, since the man had been expressly forbidden to go to the place where the accident occurred; the "top hole" was put outside the sphere of the employment by the Colliery Special Rules, and yet, in defiance of the order of the fireman, the deceased went into it. This case is exactly within *Weighill* v.

*South Hetton Coal Co., Ld.* (1), where the workman went to cut coal in a part of the mine where he was forbidden to go, and it was held that accordingly the accident did not arise "out of" his employment. [*Douglas* v. *United Mineral Co., Ld.* (2) was also cited.] The master can limit the sphere of the workman's operations—*Whitehead* v. *Reader* (3)—but the workman cannot choose the place where he will work, or dictate terms: *Bowes & Partners* v. *Press* (4); and it was not for Harding to consider whether what he was going to do would expedite his work.

*Lowe* v. *Pearson* (5), *Jenkinson* v. *Harrison, Ainslie & Co., Ld.* (6), and *Barnes* v. *Nunnery Colliery Co.* (7), where the workman was doing a forbidden act, are all in the appellants' favour.

This was not an act done upon any emergency as in *Rees* v. *Thomas.* (8) If a man chooses to go to a dangerous place, where he is expressly forbidden to go, incurring a danger of his own choosing, and altogether outside any reasonable exercise of his employment, then, if he meets with an accident, it cannot properly be held to have arisen "out of" his employment: *Brice* v. *Edward Lloyd, Ld.* (9)

*Atkin, K.C.*, and *Shakespeare*, for the respondents. Serious and wilful misconduct will not disentitle the dependants to compensation if the deceased met with his accident while doing work he was employed to do. The deceased here was employed to drill a hole into the working below, and he only went into the forbidden place in order to ascertain the direction of the drill. So long as a workman is not outside the sphere of his employment, mere disobedience to an order does not place him outside the sphere of his employment: *Whitehead* v. *Reader* (3), where the man was expressly forbidden to touch the machinery.

(1) The case is not reported, but the following judgment (post, p. 757), which gives the material facts, was read and relied on by counsel. The reporter is indebted to the appellants' solicitors for a copy of this judgment, supplied by Messrs. Cherer, Bennett & Davis, shorthand writers.

(2) (1900) 2 W. C. C. 15.
(3) [1901] 2 K. B. 48.
(4) [1894] 1 Q. B. 202.
(5) [1899] 1 Q. B. 261.
(6) (1910) 4 But. W. C. C. 194.
(7) [1910] W. N. 248.
(8) [1899] 1 Q. B. 1015.
(9) [1909] 2 K. B. 804, at p. 810.

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The man was doing his duty, though in a risky way, and on this point *Astley* v. *R. Evans & Co., Ld.* (1) is in point. It was essential to discover whether the drill was being worked in the right direction, and on this the county court judge finds as a fact that the act was honestly done in order to expedite the work. If the evidence warrants this finding there is an end of the case. There is no distinction between a limitation of area and a limitation of means for doing a particular work. [They also cited *George* v. *Glasgow Coal Co., Ld.* (2)]

*Harold Morris* replied.

*Cur. adv. vult.*

After the arguments were concluded, *C. A. Russell, K.C.*, said he thought the attention of the Court should be called to the very recent decision in *Conway* v. *Pumpherston Oil Co., Ld.* (3), which though against the appellants appeared to be indistinguishable from the present case.

June 2. COZENS-HARDY M.R. This appeal raises a difficult question. The applicants are the dependants of a deceased collier and the question is whether a fatal accident arose "out of and in the course of" his employment. The material facts may be shortly stated. [Having stated the facts and the finding of the county court judge, his Lordship continued.] I desire to repeat what I said in the recent case of *Weighill* v. *South Hetton Coal Co., Ld.* (4): Serious and wilful misconduct within the sphere of the employment does not prevent his dependants from claiming compensation, but wilful misconduct outside the sphere of his employment does not bring the accident within the sphere of the employment. The real difficulty in this case is, was the sphere of employment so limited and defined as to exclude the "top hole," or was this man's entrance into the "top hole" merely an act honestly done in furtherance of the object which he was instructed to effect, namely, to tap the gas by means of a drill hole? In my opinion the latter is the true view. This case in no way resembles the case, *Weighill* v. *South Hetton*

(1) [1911] 1 K. B. 1036, at p. 1043.
(2) [1909] A. C. 123.
(3) (1911) Scots Law Times, 440.
(4) Post, p. 757.

*Coal Co., Ld.* (1), which was recently before us, where a collier who was employed to hew coal in a particular part of the mine deliberately and for his own advantage went to a different part of the mine where the coal was softer. In that case we held that by so doing he had departed from the course of his employment. So in the present case if Harding had entered the "top hole" with the object of working coal there, and not with the view of assisting the drilling operation, I think the employers would not be liable. In my opinion he was engaged in the drilling operation, although he was guilty of serious and wilful misconduct in entering the "top hole."

I have had the opportunity of considering the very recent case of *Conway* v. *Pumpherston Oil Co., Ld.* (2), a case which is really indistinguishable from the present case, and I have the satisfaction of finding that the view which I have taken is supported by the high authority of the judges of the First Division. In my opinion the appeal fails and must be dismissed with costs.

BUCKLEY L.J. It is a matter of regret, but scarcely of surprise, that in such a case as this opinions should differ. I am of a different opinion from the Master of the Rolls.

From the judgment of the learned county court judge I read this passage: "The act though it was a disobedience of the rule and serious and wilful misconduct was honestly done for the sole purpose of expediting his work of getting coal which was the main purpose of his employment and was therefore within the scope or sphere of his employment." In that, to my mind, lies the error of this judgment. The purpose of this man's employment at the time of the injury was to drill a certain hole. The "scope or sphere of his employment," if I am to use the learned judge's expression, was not to do that act in any place whatsoever. It was to do it at one place to the exclusion of another place. To explain what I mean I will give an illustration. Suppose that the employer is a quarry owner and employs a quarryman to quarry stone in quarry A. The man goes to quarry B. and quarries there and is injured. To my mind he is outside the Act of Parliament altogether. He was not employed

(1) Post, p. 757. (2) (1911) Scots Law Times, 440.

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to go there at all. He had no business there. His business was to go to A. and quarry in A. I may add (though the reason to my mind makes no difference) that it may be that the owner knew that quarry B. was dangerous; that stone was liable to fall there; and that he had expressly closed it because it was dangerous. When the man went to B. he could not say he went there in the course of his employment at all.

To take another illustration, suppose a man is a collier and is employed to hew coal in the top seam; and that there is a lower seam and he is told not to go there. I will suppose again (though it adds nothing to my mind to it) that the ventilation of the lower seam is imperfect, and that there is gas there which makes it dangerous. Whether with reason or without reason his employment is to hew in the top seam and not in the lower seam. Under those circumstances if he goes to the lower seam and hews coal there, to my mind he is outside the sphere of his employment altogether, and if he sustains injury he is not within the Act of Parliament.

It seems to me that the Lord President in the Scotch case of *Conway* v. *Pumpherston Oil Co., Ld.* (1) laid down with perfect accuracy (if I may say so respectfully) two ways in which a servant may be outside the sphere or scope of his employment. The one is the case where he exceeds the limits imposed by the nature of his work. The instance given by the Lord President is that where the footman takes the reins and drives the horses. He is not within his employment for he is not employed for that purpose. The other is where the man goes into a territory with which he has nothing to do, of which I have given the instance where the man employed to work in quarry A., or in the top seam, goes into quarry B., or the lower seam. He is not then in the course of his employment at all.

The question to be determined here is whether the present case is one of that description. One of the purposes of this man's employment, in fact the whole purpose at the moment, was to drill a hole from the bogey to the top hole. Was it within the scope or sphere of his employment to do that act from any point

(1) (1911) Scots Law Times, 440.

whatsoever? That is a question of fact to be determined. Was he in like case with the man employed to hew in the top seam and not in the lower seam, or to quarry in A. and not in B.? The top hole is, in my illustration, equivalent to the lower seam, in which I have been supposing that the ventilation was imperfect, and the place dangerous. He had no business there at all. It was not merely that he was not to go to a place—that, as I will point out presently, may be serious and wilful misconduct. His employment was to drill a hole, working at a certain place to the exclusion of a certain other place. Directly he went to the latter place he was outside the course of his employment, or what has been called the scope or sphere of his employment. Those words "scope or sphere" seem to me not misleading; they are useful words: you have to see whether it is in the course of the employment, and if the employment be a limited employment (as it always is), then you have to see what are its limits, and its limits are defined by seeing what is its sphere or its scope.

I want to add something lest this judgment should be misunderstood. The question is not whether the man in the course of his employment went to a forbidden place. If that be it, there may be simply serious and wilful misconduct, and he may be entitled to recover. The question is: Has the man done an act outside the sphere of his employment, or has he in doing an act within the sphere of his employment been guilty of serious and wilful misconduct? If it be the former he is not entitled to recover; if it be the latter he is.

Let me give an illustration as to place. Suppose a man is employed in a factory and his duty is to go to and fro in the factory to carry goods, and he is told that he must always go by this passage and return by that passage. I am supposing a rule or regulation simply for the purpose of freedom of circulation in the factory. If he goes by the passage by which he ought to return, he will have broken a rule as to place, but he will not be out of the course of his employment; he will be there for the purpose of his employment doing an act within the sphere of his employment, carrying goods or whatever it may be, but doing it in a forbidden way.

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As regards the case of *Conway* v. *Pumpherston Oil Co., Ld.* (1), it is, I agree, exceedingly pertinent to this case, and I may say my mind goes with the Lord President entirely in the illustration that he gives of the way in which the case is to be treated; but what I have looked for, and looked for in vain, is to see by what course of reasoning the Lord President arrived at his conclusion when he said "The mere fact he went into the upset does not take him out of the sphere of his employment." I cannot find any reasoning leading to that. If there was reasoning which led to the conclusion that it was within the sphere of his employment although he went there by way of misconduct, or that it was not so, I need not say I would have considered that and given effect to it to the best of my ability, but while I follow the Lord President as to the indication which he gave of the lines which ought to guide him, I fail to find any reasoning which led him to the conclusion, and therefore I am unable to assist myself by following that reasoning in dealing with the present case.

I only want to add out of respect to the Master of the Rolls, who has expressed a different opinion, that *Weighill* v. *South Hetton Coal Co.* (2) seems to me to be the same as this case. It cannot constitute any difference that it was to the pecuniary advantage of the man, or not to the pecuniary advantage of the man, to go to the forbidden place. The whole question is whether it was forbidden in the sense that it was misconduct to go there, or whether he was out of his employment when he went there. In the case of *Weighill* v. *South Hetton Coal Co.* (2) the facts were that the collier was sent to work in one place and he went and worked in another place. As it happened, the latter place was a dangerous place, and what we held was that when he went there he was out of the scope of his employment altogether. To my mind it makes no difference that the motive that led him to go there was a motive which was for his pecuniary advantage. The whole question is whether he ought to have gone there or not; directly we found he should not have gone there, then to my mind the limits of his employment were exceeded and he was not within the Act at all. For these reasons it seems to me the judgment of the county court judge was

(1) (1911) Scots Law Times, 440. (2) Post, p. 757.

wrong. I have indicated where it appears to me that it goes wrong. I think this appeal ought to be allowed.

KENNEDY L.J. I think that the learned county court judge was justified in coming to the decision which is under appeal.

[After stating the facts, his Lordship continued.] That which the deceased did in breach of the directions previously given by his superiors and the regulations of the mine constituted, I agree with the learned county court judge, serious and wilful misconduct. But this fact will not of itself operate to deprive his dependants of the right to compensation under the Act. That right depends upon proof that the death of the deceased was due to an accident in the course of and arising out of his employment.

Now his employment was, in my view, to drill the air passage through the coal from the bogey into the top hole; and, unquestionably, this breach of duty and of orders was committed by him in order successfully to carry out and whilst he was engaged in carrying out the purpose of this employment. It appears to me in these circumstances that the fatal accident was none the less an accident in the course of and arising out of his employment, because he did not confine his operations to the area of the bogey as he ought to have done. I see in such a case no sound distinction of principle between breaking instructions as to place and breaking instructions as to the use of machinery, or any other limitation imposed by the employer.

Take the case of a workman ordered to clean a high window, and at the same time to do that work only from the inside of a room and not to step outside; or, still nearer to the present case, the case of a workman ordered to break through the ceiling between two floors of a house, and told at the same time to work only from the upper floor; it is no doubt wilful misconduct, and might in some circumstances be serious misconduct, of the workman in each of these cases to do the work without also complying, in the manner of doing it, with the instructions he has received; but none the less, as it appears to me, if he disobeys, solely for the purpose of the work, and meets with a fatal accident, his death may be held to be due to an injury in the course of and arising out of his employment. Provided that

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he meets his death by accident in the performance of the particular piece of work which it is his duty to do, I do not think that the mere fact of non-compliance with a limitation as to area, any more than the mere fact of non-compliance with a limitation as to method, if the purpose of the non-compliance is the effective furtherance of the purpose of the workman's proper task, ought to be held necessarily, or indeed ordinarily, to put his death by the resulting accident outside the employment so as to exclude his dependants from the benefit of this Act of Parliament. It is with the utmost diffidence that I venture to criticize any expression which appears in a judgment of Lord Collins as in *Whitehead* v. *Reader* (1); but "sphere of employment" appears to me to be rather a dangerous metaphorical expression, in so far as it tends to introduce a suggestion of special importance, in regard to s. 1 of the Act, of the workman's obedience to an order as to the local area of working.

No case was cited to us which militates against the view, affirming the award of the county court judge, which I concur with the Master of the Rolls in taking in regard to the present case.

*Brice* v. *Edward Lloyd, Ld.* (2), which was referred to in the course of the argument, is clearly distinguishable upon the facts. There the workman had clambered up on a hot water tank—an unauthorized and dangerous place—not for the purpose of any work for his employer, but because he chose to go there to eat his supper.

On the other hand, the decision of the First Division of the Court of Session in the very recent case of *Conway* v. *Pumpherston Oil Co., Ld.* (3) is entirely in accord with our decision in the present case, and was given upon facts which, in essentials, closely resembled those which we have before us.

I am of opinion that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Barlow, Barlow & Lyde ; Smith, Rundell & Co., for Morgan, Bruce, Nicholas & James, Pontypridd.*

(1) [1901] 2 K. B. 48. (2) [1909] 2 K. B. 804.
(3) (1911) Scots Law Times, 440.

W. C. D.

WEIGHILL *v.* SOUTH HETTON COAL CO., LIMITED.

March 1, 1911.

APPEAL from the judge of the Seaham Harbour County Court.

*C. A. Russell, K.C.*, and *Meynell*, for the appellants.
*Mitchell Innes, K.C.*, *Griffith Jones*, and *Jackson*, for the respondents.

COZENS-HARDY M.R. The learned judge in his judgment says this: "The question of law is whether this man being authorized to hew at the face of the coal where it was hard and having gone to the wall side to hew where it was soft, his relatives are outside the Act. It is said he was never employed to hew coal there at all and that to get coal there was improper, but in my opinion it was 'within the scope of his employment.'"

The learned judge states the proposition of law, and I accept that as an accurate statement. It is only necessary, I think, to add a very few words. It is plain that the deceased man was according to the finding of the learned judge authorized to act and employed to act as a hewer on the face of the roadway which was being made in this mine. He was to work with Laws on the face of this road to get coal there and put it in tubs with a view to the coal thus hewn being taken to bank. Instead of doing that, he went seventy yards further back on the driftway where the drift had been made the full width, where it had been timbered, and there he, in direct contradiction of the statutory rules and the notices in the colliery, hewed coal at the side, with the consequence that the coal fell upon him and he was unfortunately killed.

Now there is no doubt that that was serious and wilful misconduct. The learned judge seems to think that it is enough in case of death to say that there being serious and wilful misconduct it is not really material to consider whether the act was done within the sphere of his employment or outside the sphere of his employment, and Mr. Mitchell Innes in his very clear argument has said to us that unless we take that view we really strike out of the Act those words which in case of death or permanent disablement say that serious or wilful misconduct shall be no answer to the claim of the workman. I think that is a fallacy. Serious and wilful misconduct within the sphere of the employment does not prevent the workman's dependants from claiming compensation: serious and wilful misconduct outside the sphere of his employment is entirely different. Serious and wilful misconduct outside the sphere of his employment does not bring within the sphere of the employment that which but for the serious and wilful misconduct would be outside of it. Any other view would be so startling as to be really, I think, almost absurd. Mr. Russell gave an illustration which I think was very apt. Suppose I employ a ploughman to plough a field and instead of that he ploughs up my kitchen garden. Of course that was not within the sphere of his employment at all, and any accident arising from that would not render me liable even though in addition to ploughing up my kitchen garden there was some separate and independent act of serious and wilful misconduct. In my opinion the learned judge was wrong in the question of law which he clearly submits to us and he ought to have held

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that this act was entirely outside the sphere of this man's employment and that it is not brought within the sphere of his employment by the existence of serious and wilful misconduct.

FLETCHER MOULTON L.J. I entirely agree. I think the true definition of the scope of this man's employment was to hew coal at a particular face, but straining as far as I possibly could in the favour of the workman it was at all events not wider than to hew coal at a working face. This man did not hew this coal at a working face at all; he went and attacked the sides of the finished drift, which was in my opinion entirely outside the scope of his employment.

I agree with all that the Master of the Rolls has said as to the law, and think that this appeal must be allowed.

BUCKLEY L.J. The learned judge has, I think, suffered himself to confuse two things which are quite distinct; the one is whether the workman has done an act outside the sphere or scope of his employment, the other is whether in doing an act within the sphere of his employment he has been guilty of serious and wilful misconduct. If it be the latter, serious and wilful misconduct is no defence where death or serious and permanent disablement follows, but serious and wilful misconduct does not make that which is outside the sphere of the employment an act within the sphere of the employment. The question must first be answered what was the man's employment? If when he was injured he was doing an act outside the sphere of his employment, he was no doubt guilty of misconduct, because he ought not to have done it, but that will not help him to bring it within the sphere of his employment. This man's employment did not include the hewing of coal where he was killed. When he went there he was acting outside the sphere of his employment: he was guilty of serious and wilful misconduct in going there, but that did not bring it within the sphere of his employment. At the time that he was injured he was not within the Act of Parliament at all.

*Appeal allowed.*

Solicitors: *Hyman, Isaacs & Co.; Rawle, Johnstone & Co.*

W. C. D.

## STRASS *v.* SPILLERS & BAKERS, LIMITED.

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*Feb.* 21.

*Sale of Goods—C.f.i. Contract—Policy handed over with Goods—Honour Policy on Increased Value—Right of Buyer to Policy.*

The defendants bought a cargo of wheat at a price to cover cost, freight, and insurance under a contract which contained the clause "Seller to give policies of insurance (free of war risk) for 2 per cent. over the invoice amount, and any amount over this to be for seller's account in case of total loss only." In order to fulfil the contract the seller bought a cargo of wheat from a person to whom the plaintiff had sold it, the contracts throughout being in the same form and containing the above clause. The plaintiff handed over to the buyer from him a policy for 2 per cent. over the invoice amount, and this policy was handed over to the defendants in due course. The plaintiff, before selling the cargo, had taken out an honour policy on increased value of the wheat for his own benefit, which policy he retained in his own possession. A loss having occurred, the underwriters paid the defendants the full amount under the policy which had been handed over to them. The plaintiff then sent the increased value policy to the defendants, requesting them to collect from the underwriters the amount payable thereunder. The defendants did so, and upon being paid the amount by the underwriters they claimed to retain it upon the ground that under the contract of sale the plaintiff was bound to hand over all policies effected on the wheat at the time when he entered into the contract of sale. In an action by the plaintiff to recover the amount as money had and received to his use:—

*Held*, that, as the increased value policy was an independent honour policy effected by the plaintiff for his own benefit, the defendants were not entitled to it under the contract, and that the plaintiff was entitled to recover the amount received by the defendants thereunder as money had and received to his use.

*Ralli* v. *Universal Marine Insurance Co.*, (1862) 4 D. F. & J. 1, and *Landauer* v. *Asser*, [1905] 2 K. B. 184, discussed.

Trial of action in the commercial list before Hamilton J. without a jury.

The plaintiff, who carried on business at Antwerp, claimed to recover two sums of 524*l.* 0*s.* 9*d.* and 128*l.* 18*s.* 3*d.*, making together the sum of 652*l.* 19*s.*, as money had and received by the defendants to his use upon two policies of insurance for 2000*l.* and 492*l.* respectively on increased value upon a cargo of wheat shipped per the *Leon Bureau*, or alternatively as damages for the conversion of the policies. The defendants in their points of defence denied that the plaintiff was entitled

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to receive the said sums under the policies, and alleged that under a contract dated December 30, 1908, for the sale of the cargo to them they were entitled to the shipping documents of the cargo, including the two policies in question; and alternatively, as to the claim for conversion, they paid into Court the sum of 1*s.* as sufficient to satisfy the plaintiff's claim.

By a contract dated December 30, 1908, which was headed "London Corn Trade Association. Australian Wheat Contract," the defendants, through Messrs. Harris Brothers, bought of Messrs. Dewar & Webb a cargo of South Australian wheat of the 1908-1909 crop, per first-class iron or steel sailer from a port or ports in South Australia as per bill or bills of lading, to be dated January and/or February, 1909, 12,000 units, 5 per cent. more or less, at the price of 36*s.* 6*d.* per 480 lbs. gross, including freight and insurance to any safe port in the United Kingdom, calling at Queenstown, Falmouth, or Plymouth for orders as per charterparty. "Payment by buyer's acceptance of shipper's draft or drafts at 60 days sight, payable in London with documents attached, or, at seller's option, by cash in London, in exchange for shipping documents on arrival of vessel at port of call, or if shipped direct, at port of discharge, but in no case later than three business days before due date of shipper's draft or drafts, less discount at the rate of one-half of 1 per cent. per annum above the advertised rate of interest for short deposits allowed by the leading joint stock banks in London. Buyer to have the option of retiring documents before due date of draft or drafts under discount as above. Seller to give policies of insurance (free of war risk) for 2 per cent. over the invoice amount, and any amount over this to be for seller's account, in case of total loss only."

On February 2, 1909, the plaintiff, by a contract in writing in similar form and containing similar clauses to the above, purchased from Messrs. Allatini, who were grain merchants in London (1), the cargo of South Australian wheat of the same

(1) It appeared that Messrs. Allatini on the same day had themselves purchased the cargo under a similar contract at the price of 37*s.* less ¼ per cent.

crop per the sailing ship *Leon Bureau*, 13,000 units at the price of 37*s.* 1½*d.* per 480 lbs. gross, including freight and insurance. The plaintiff received from Messrs. Allatini, in accordance with the contract, a policy on the cargo for 21,300*l.* dated February 16, 1909. The market price of wheat having risen since February 2, the plaintiff on February 9 effected a policy on increased value of the wheat for 2000*l.* with the London Assurance Corporation, and a second increased value policy on February 27 for 2000*l.* with the British and Foreign Marine Insurance Company. Both these policies were in the same form, covering the voyage of the *Leon Bureau*, and being upon the cargo of the *Leon Bureau*, "2000*l.* increased value on about 12,439 quarters wheat in 28,002 bags. To pay as cargo but in case of general average to pay only the amount applying to the excess of contributory value over the other insurances effected on the cargo itself; without benefit of salvage;" warranted free from average, unless general, or the ship be stranded.

On March 16, 1909, the plaintiff, by a contract in writing in the same form and containing the same clauses as the above-mentioned contract of August 30, 1908, resold the above-mentioned cargo of wheat per *Leon Bureau* to Messrs. Allatini at the price of 39*s.* 6*d.* per 480 lbs. gross, including freight and insurance; and on the same day by a contract in similar terms Dewar & Webb bought the cargo of wheat at 39*s.* 6*d.* per 480 lbs. gross, including freight and insurance, from Messrs. Allatini, in order to fulfil their contract of December 30, 1908, with the defendants, and the cargo per the *Leon Bureau* was declared to the defendants in fulfilment of the contract of December 30, 1908.

The difference between the amount of the policy of insurance which the plaintiff was entitled to receive from Messrs. Allatini under the contract of February 2 and the amount of the policy which the plaintiff was bound to give to Messrs. Allatini under the contract of March 16 was 1508*l.*; and to meet this increased insurance the plaintiff had the increased value policy of February 27 with the British and Foreign Marine Insurance Company divided into two policies for 1508*l.* and 492*l.* respectively, and he handed to Messrs. Allatini the policy for 1508*l.*, retaining the

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one for 492*l.* as well as the increased value policy for 2000*l.* effected with the London Assurance Corporation.

The cargo was duly shipped on board the *Leon Bureau* at Port Adelaide, and in June, 1909, while bound for a port in the Bristol Channel, she touched a rock off the coast of Cornwall and had to be beached, and the cargo sustained a particular average and general average loss. The adjustment in respect of the loss was made on August 26, 1909, and the losses were paid on the policies handed over under the contract of sale to Messrs. Dewar & Webb and by them handed over to the defendants. These policies did not include the two increased value policies effected by the plaintiff with the London Assurance Corporation and the British and Foreign Marine Insurance Company for 2000*l.* and 492*l.* respectively, which were retained by the plaintiff.

On December 20, 1909, the plaintiff sent these two policies to Messrs. Allatini, stating "we shall thank you to hand these two policies to the receiver of the cargo to be handed by him to the adjusters for the purpose of making up the general average statement, and thus establish the amount due to us." On December 23 Messrs. Allatini sent the two policies on to Messrs. Dewar & Webb in a letter stating "we have received from our sellers of the cargo of wheat per *Leon Bureau* the enclosed two policies for 2000*l.* and 492*l.*, insured increased value, with instructions to hand them to the receivers of the cargo in order that the average adjusters should include them in their statement for general average and secure the claim the insurers may have under the above policies." Messrs. Dewar & Webb sent them on to Harris Brothers, who on December 24 sent them on to the defendants in a letter which quoted in full the above letter from Messrs. Allatini to Messrs. Dewar & Webb. Meanwhile Messrs. Allatini having in a letter to the plaintiff of December 21 expressed a doubt as to whether anything would be recovered under the policies, the plaintiff on December 23 wrote to them asking that the policies should be returned to him, and this request was passed on through Messrs. Dewar & Webb to Harris Brothers, who on December 28 wrote to the defendants as follows: "Messrs. Dewar & Webb write as follows:—'*Leon Bureau*. Kindly return us documents of above, and oblige.'"

On December 29 the defendants wrote to Harris Brothers acknowledging the letters of December 24 and 28 as follows: "We are in receipt of your favour of 24th inst. enclosing increased value policies for 2000*l.* and 492*l.* respectively from sellers of this cargo of wheat. We do not see however how the insurers can have any claim under these policies under G/A. We have also your memo. of 28th inst. and note that Messrs. Dewar & Webb wish the documents relating to this cargo returned to them. Do they mean the bill of lading, &c.?" On December 29 the defendants forwarded the policies to their insurance brokers, Gillespie, Cross & Co., stating that they "also enclose statement of particular average and loss on wheat to enable you to recover the proportion due under these policies from underwriters together with a note of the amount which we make due. The enclosed policies should also apparently bear a proportion of the 30*l.* special charges, and this, we think, should go to the credit of the underwriters who have already contributed including our policy for 3000*l.* freight and contingency. If you think it necessary to have a supplementary statement prepared, we leave you to do so."

The supplementary statement was accordingly prepared by Messrs. Francis & Arnold, the average adjusters who had prepared the original statement, and on January 4, 1910, the defendants wrote to their brokers, Gillespie, Cross & Co., stating that "Messrs. Francis & Arnold have now handed us the supplemental statement and we enclose it herein," together with the additional policies. "Kindly collect amounts due from underwriters, sending us credit note and remittance in due course." On January 17, 1910, the plaintiff again wrote to Messrs. Allatini demanding the return of the policies, and on January 19 this request was forwarded through Harris Brothers to the defendants, who on January 20 replied that the policies were in the hands of Messrs. Gillespie, Cross & Co., and as soon as the policies came back they would return them. Meanwhile, the average adjusters having prepared the average statement, the underwriters paid to the defendants 524*l.* 0*s.* 9*d.* on the London Assurance policy and 128*l.* 18*s.* 3*d.* on the British and Foreign Marine policy, and these payments were indorsed on

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the respective policies. On February 5 the insurance brokers returned the policies to the defendants. On February 7 the defendants sent them to Harris Brothers, adding, "return same to us when done with and oblige." In due course the policies were passed on to the plaintiff.

These two sums, amounting together to 652*l.* 19*s.*, the plaintiff sought to recover in this action. At the trial an insurance broker at Lloyd's was called as to the custom of underwriters to pay upon these honour policies, and the effect of his evidence is stated in the judgment.

*E. M. Pollock*, K.C., and *F. D. Mackinnon*, for the plaintiff. The plaintiff, as seller of the cargo of wheat, handed to the buyers the two policies of 21,300*l.* and 1508*l.* in fulfilment of the contract of sale, and the defendants, as the ultimate buyers, have been paid the amounts due under the policies. The increased value policies for 2000*l.* with the London Assurance Corporation and for 492*l.* with the British and Foreign Marine Insurance Company belonged to the plaintiff, and he kept them in his possession. These policies were independent honour policies, which the underwriters were not legally bound to pay, though they always do pay upon them. The plaintiff sent them to the defendants as his agents to collect the amounts due under them, and the defendants, having received the policies for a particular purpose, and having collected the sums payable thereunder, are not entitled to keep the amount so collected for their own benefit. The defendants are not entitled to take the policies and then refuse to collect the amount due thereunder for the plaintiff. If they did not accept the mandate to collect for the plaintiff, they ought to have returned the policies. The plaintiff is therefore entitled to recover the amount as money had and received by the defendants to his use. The defendants are in no better position than an agent who is employed by a principal to make a bet for him and to collect the amount if he wins, in which case the principal is entitled to recover the amount from the agent as money had and received to his use: *Bridger* v. *Savage* (1); *De Mattos*

(1) (1885) 15 Q. B. D. 363.

v. *Benjamin*. (1) The case of *Landauer* v. *Asser* (2) is not in point. In that case the contract was for the sale of goods at a price to cover cost, freight, and insurance, "insurance for 5 per cent. over net invoice amount to be effected by sellers for account of buyers." An insurance for a larger amount than 5 per cent. over the net invoice amount was handed with the shipping documents to the buyers in exchange for the price. A loss having occurred and the underwriters having paid upon the whole amount insured, it was held that the sellers were not entitled to the balance above the net invoice amount plus 5 per cent. That was not the case of an independent honour policy effected by the sellers for their own benefit; it was a policy effected for the purpose of the contract of sale. The buyers there did not collect the insurance moneys as agents for the sellers. The words in the contract in the present case, "and any amount over this to be for seller's account in case of total loss only," mean the amount recovered under the policy annexed to the contract, and not under an independent policy. It may be that those words were inserted to meet the decision in *Landauer* v. *Asser*. (2) In *Ralli* v. *Universal Marine Insurance Co.* (3) a cargo of wheat had been insured, and the cargo, which had fallen in value, was sold at a price including freight and insurance. The cargo having been lost, the buyers were held entitled to the full benefit of the policies, though the amount exceeded the value of the cargo, the Court of Appeal, reversing the decision of Page Wood V.-C. (4), holding that the buyers were entitled under the contract to all then existing policies. The policies were those referred to in the contract. The Lords Justices treated the question as depending upon the true construction of the contract. In the present case the increased value policies were independent policies, taken out by the plaintiff for his own benefit and not intended to come within the contract of sale. It was an insurance without interest, which the underwriters have paid, and does not come within the contract: *Harland & Wolff* v. *Burstall & Co.* (5) The plaintiff is therefore entitled to recover.

(1) (1894) 63 L. J. (Q.B.) 248.
(2) [1905] 2 K. B. 184.
(3) 4 D. F. & J. 1.
(4) (1861) 2 J. & H. 159.
(5) (1901) 6 Com. Cas. 113, at p. 117.

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*Bailhache*, K.C., and *D. C. Leck*, for the defendants. The defendants did not accept the mandate of the plaintiff to collect the moneys due under the policies for him. They were themselves principals, and gave instructions to their brokers to collect the moneys for themselves. To entitle a person to recover under the count for money had and received he must shew that the person paying the money paid it with the intention that it should reach the hands of the person claiming it. The underwriters intended to pay the moneys to the persons who had an interest under the policies, and not to a person who had none. The defendants had an insurable interest in the cargo and the plaintiff had none, and the underwriters intended to pay the persons who had an insurable interest. It is difficult to see how it can be said that the money was money had and received to the use of the plaintiff. The defendants were all along asserting the right to collect for themselves and intended to do so. In *Tenant* v. *Elliott* (1) the defendant, who was the plaintiff's agent, effected an insurance on goods for a particular voyage; the insurance was illegal by statute, but, the goods being lost, the underwriters paid to the defendant the amount of the insurance. It was held that the plaintiff could recover from the defendant the amount so paid as money had and received to his use. In that case the underwriters intended to pay the person interested in the policy, and not the defendant, who was merely a broker. The language of Kennedy J. in *Landauer* v. *Asser* (2) is applicable here.

Next, a contract for the sale of goods at a price "including freight and insurance" means any insurance which has in fact been effected on the goods: *Ralli* v. *Universal Marine Insurance Co.* (3); *Landauer* v. *Asser*. (4) It is the duty of the seller under such a contract to hand over to the buyer all contracts of insurance which have been or will be effected on the goods, and it is immaterial whether the insurance is effected by means of one policy or of more than one policy. The true construction of the contract, having regard to the fact that it is a contract for the sale of insured wheat, is that the buyer is entitled to the benefit

(1) (1797) 1 Bos. & P. 3.
(2) [1905] 2 K. B. at p. 193.
(3) 4 D. F. & J. 1.
(4) [1905] 2 K. B. 184.

of all insurances, whether enforceable in a Court of law or not, effected by the seller, with a minimum insurance to cover invoice price plus 2 per cent. "Any amount over this to be for seller's account in case of total loss only" supports this view. The plaintiff ceased to have any interest in the goods sold, and the intention of the contract is that all policies effected on the goods shall pass to the receiver of the cargo, who in the event of total loss only is to account to the seller for any excess over the invoice amount plus 2 per cent. These two policies when effected became part of the shipping documents, and the defendants are entitled to them under the contract.

Counsel for the plaintiff was not called upon to reply.

HAMILTON J. This is an action to recover two sums amounting together to 652*l.* 19*s.*, which the defendants have received from the British and Foreign Marine Insurance Company and the London Assurance Corporation respectively on two policies effected by the plaintiff, called increased value policies. The plaintiff's claim is for damages for conversion, and alternatively for money had and received to his use. The defendants in answer allege that they were entitled to receive the policies from the plaintiff, and that, having collected the moneys due upon the policies, they are entitled to retain them for their own benefit.

The claim arises out of a contract for the sale of a cargo of Australian wheat. On December 30, 1908, the defendants, through Harris Brothers, a firm of brokers, bought from Messrs. Dewar & Webb a cargo to arrive which was to be shipped under bills of lading to be dated January and/or February, 1909. Ultimately the cargo which was declared to them was that by the sailing vessel *Leon Bureau*. There had been other dealings with the cargo before it reached British waters, and in particular by a contract in similar form, dated March 16, 1909, Messrs. Allatini had bought the cargo from the plaintiff, and they by a contract in similar form of the same date sold the same cargo to Messrs. Dewar & Webb, who thereby fulfilled their contract of December 30, 1908, with the defendants. The vessel, bound for a Bristol Channel port, went ashore on the coast of Cornwall

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and sustained considerable damage, but there was ultimately such salvage that the claim in respect of the cargo was only for particular and general average. The adjustment in respect of the loss was made on August 26, 1909, and on the following day the underwriters on the policies on cargo paid the losses. The policies, which were handed over by the plaintiff and which ultimately reached the defendants and were accepted by them as being the policies they had to receive under the contract, did not include two policies on increased value, namely, one for 2000*l.* dated February 9, 1909, and the other for 492*l.* dated February 27, 1909, and after the loss on the cargo had been adjusted the plaintiff made a claim upon these two policies. In them the voyage was expressed in terms which covered the voyage of the *Leon Bureau*, and they covered the contracts of sale. The subject-matter was "2000*l.*"—in the other policy 492*l.*—"increased value on about 12,439 quarters wheat in 28,002 bags. To pay as cargo, but in case of general average to pay only the amount applying to the excess of contributory value over the other insurances effected on the cargo itself; without benefit of salvage;" warranted free from average unless general or the ship be stranded. It is to be observed that the policy is expressed to be on increased value; to pay as cargo, shewing that it is not in the ordinary sense a mere insurance on cargo; and to pay in case of general average, not pari passu with all other portions of the cargo and all other policies on cargo, but only in a particular way; it is warranted free from particular average; and finally it is without benefit of salvage. It is in fact an honour policy.

If it had been tendered as one of the policies on the cargo attached to the bill of lading the buyer under any of these contracts might justly have taken exception to it upon the ground that he could not put it in suit because it was an honour policy, that he might not be able to recover general average to the full amount, that he could not recover particular average, and that it was not expressed to be upon cargo, but upon increased value of cargo. The object of the plaintiff in taking out the policy admits of no doubt. It was a legitimate speculation, carried out by means of honour policies, in view of the rise in the market value of wheat,

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under G/A." They also note that Messrs. Dewar & Webb wish the documents relating to the cargo to be returned to them. Though the language used by Messrs. Allatini, "should include them in their statement for general average," was inartificial and possibly obscure, it must have been clear to the defendants that there was no intention on the part of the sender that the defendants should collect the moneys upon them at that late hour for their own benefit. The defendants sent the policies on December 29 to their London brokers, Gillespie, Cross & Co., asking them to get, if necessary, a supplementary statement made, and stating that there might be a recovery of the proportion due under those policies from the underwriters, in other words, a recovery from the underwriters for their own benefit. The defendants took the view that, inasmuch as the policies had been taken out by some one who at that time and at the time of the loss had ceased to have any interest in the cargo, either on general principles or under the terms of the contract the benefit of the policies belonged to them as receivers of the cargo and as the only persons who had an insurable interest in the cargo at the date of the loss. The result was that the average adjusters who prepared the original adjustment prepared a supplementary statement, and in due course the underwriters paid 524*l.* 0*s.* 9*d.* on the London Assurance policy and 128*l.* 18*s.* 3*d.* on the British and Foreign Marine Insurance policy, making up the amount claimed in this action, and the payment was duly indorsed upon the policies. While this was proceeding the plaintiff again sent on January 17 a request for the return of the policies, and on February 7 the defendants, having received the policies from Gillespie, Cross & Co., sent them to Harris Brothers, requesting the latter to return them when done with. In due course the policies reached the plaintiff's hands. I do not think that by reason of their not being returned at once the plaintiff has any ground of complaint. They were not out of the defendants' hands longer than would have been necessary for the purpose for which they were originally sent, and when they came back to the defendants they were at once sent to the plaintiff. There is no ground for saying that there was any conversion of the policies

themselves by demand and refusal to return them. The defendants, however, received the policies for one purpose and dealt with them for another, thinking that they had a right to do so. It was clear to them that they were asked to collect the money on those policies for a third person, and unless they were entitled to collect the money for their own benefit they were in the position of persons who had no right to collect it except for the benefit of that third person and on the terms of accounting to him.

The main ground alleged by the defendants for their claim to retain the money turns upon the construction of the contract. The contract is on the London Corn Trade Association, Australian wheat, contract form, and this particular form is headed 1906, but probably the material clauses in the policy are of much older date. Each one of the contracts relating to this cargo was on this form, although there are one or two differences with regard to price and other minor matters inserted in writing. The contract dated March 16 is for the sale by the plaintiff of a cargo of wheat at the price of 39*s.* 6*d.* per 480 lbs., including freight and insurance, to any safe port in the United Kingdom, and then follows this clause: " Seller to give policies of insurance (free of war risk) for 2 per cent. over the invoice amount, and any amount over this to be for seller's account, in case of total loss only." It is said by the defendants that the words " including freight and insurance " mean that the subject-matter of the sale is an insured cargo, and that that means a cargo as it is insured by the seller, and not merely a cargo which the seller thereby undertakes before the buyer accepts it to get insured in accordance with the contract, and that where he has insured it to an extent in excess of the obligation of the contract, it is a sale of the cargo as so insured, and passes to the buyer the benefit of such insurances as have been effected. *Ralli* v. *Universal Marine Insurance Co.* (1) is cited as an authority for that proposition. In that case there was a contract for the sale of a cargo of wheat at 52*s.* 7½*d.* per quarter, including freight and insurance, and both the Lords Justices, in language somewhat differing, but substantially to the same effect, said

(1) 4 D. F. & J. 1.

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that it was a question of the construction of the contract, and that in their view the contract meant that the wheat was sold as insured at the value which the sellers had set upon it in the policies of insurance which they had at the time effected. Upon that authority it is said that the contract in the present case is for the sale of the cargo as between any intermediate seller and buyer as insured at the values which the seller set upon it in any policies of insurance, including policies on increased value, which he has effected; and it is accordingly contended that, though there is no privity of contract between the plaintiff and the defendants, the latter are entitled to claim the policies which the plaintiff has effected on the increased value as being documents which ought to be attached to the bill of lading. Assuming, however, that the defendants are in a position to say that under the words "including freight and insurance" they can claim from the persons with whom they have privity of contract the delivery of some insurance not effected by such persons, or assuming that they are in a position to say that the policies intended in December, 1908, between the defendants and Messrs. Dewar & Webb included a policy effected in 1909 by the plaintiff for his own benefit, the question arises, how is that consistent with the subsequent clause, "seller to give policies of insurance for 2 per cent. over the invoice amount, and any amount over this to be for seller's account, in case of total loss only"—a clause which was not in the contract under discussion in *Ralli* v. *Universal Marine Insurance Co.* (1) In that case the clause was, "In exchange for bills of lading and policies of insurance effected with approved underwriters." In the present case the clause specifies the amount of the policies which are to be handed over instead of leaving that to be determined, as in *Ralli's Case* (1), exclusively by reference to the price of the cargo, including freight and insurance. It is difficult to see why the parties should specify the amount of the policies which are to be given if the true meaning of the contract is that under the words "including freight and insurance" the policies to be given are those in fact effected by the seller. The answer which the defendants give is that the clause is intended to provide a minimum insurance

(1) 4 D. F. & J. 1.

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for the buyer. The clause, however, does not use the word "minimum" or suggest it in any way. It binds the seller to insure effectively for the invoice amount and for the margin of 2 per cent. which is to be in favour of the buyer, any amount over this being for seller's account, in case of total loss only. The defendants ask me to read the words "any amount over this" as equivalent to any policy over this amount to be for buyer's account except in case of total loss. I do not think that the clause can be so construed without doing violence to the words used. Whether the clause was inserted in consequence of the decision in *Landauer* v. *Asser* (1), or whether it is of older date, its object, as it seems to me, is to secure that, in regard to the policies which the seller is bound under the contract to give, any surplus over the invoice amount plus 2 per cent. is in case of total loss only to be for seller's account. The seller is to give policies for an amount which is fixed, and in this case for the convenience of business a policy was in fact handed over, as between the plaintiff and Messrs. Allatini, which was somewhat in excess of the invoice amount plus 2 per cent., the invoice value naturally varying as between each pair of contracting parties. The clause does not relate to the fixing of a minimum; it fixes the amount of insurance which the seller is bound to effect. The contract entered into by the defendants on December 30, 1908, was not, as was the case in *Ralli* v. *Universal Marine Insurance Co.* (2), made so as to affect policies already effected, but it was made in view of insurances to be thereafter effected, and in such a case there can be no obligation beyond that of insuring for the invoice amount plus 2 per cent. Further, as I have already said, these two policies were not such as the seller could have tendered to the buyer in discharge of his obligation to insure, nor do they come within the category of policies which are intended to be attached to the documents under a c.f.i. contract. The transaction is the plaintiff's private speculation. Whether the underwriters choose to pay upon them is a matter for them to decide, but the speculation is the plaintiff's own, entered into for an intelligible reason, but not intended to be part of the contract of purchase and sale. If the argument of the

(1) [1905] 2 K. B. 184. (2) 4 D. F. & J. 1.

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defendants were correct, I do not see how the conclusion could be avoided that the ultimate receiver of the cargo would also be the ultimate collector of all increased value policies which might have been effected by each of the various sellers through whose hands the cargo had passed in the chain between the original seller and the ultimate buyer, the result of which would be that the ultimate receiver would be entitled not only to receive a complete indemnity upon the policy attached to the bill of lading, but also to recover the aggregate of the sums which would be receivable under a series of policies entered into as a speculation by the various sellers for their own purposes. This seems to me to be a consequence too startling to be accepted.

In these circumstances I do not think that the defendants have any right to this money. No doubt they collected the money for themselves thinking that they were entitled to it, whereas they were not. I am asked to find as a matter of fact that the underwriters, when they paid the money upon these policies to the defendants' brokers, intended that it should be received by the defendants for their own use, and that this prevents the money having been received by the defendants to the use of the plaintiff. I am unable to draw that inference. The underwriters knew the terms of the policies and the nature of the transaction. The evidence before me shews that it is a familiar transaction. They must have appreciated from the terms of the policies that this was not the kind of policy which is tendered for payment by an ultimate receiver of the goods, but is such a policy as is tendered by persons who wish independently to insure the goods to protect themselves against the fluctuations of the market. From that I should infer that they only meant to pay those persons who could give them a good discharge, and they appreciated that the persons they were paying had probably no insurable interest in the cargo, having parted with whatever insurable interest they once had. That is a description of the plaintiff and not of the defendants. I therefore infer in fact, if it be material, that the intention of the underwriters was to pay the person who alone occupies the position of the plaintiff, and, that being so,

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the defendants fail on this objection as well as on the construction of the contract. I do not understand the language of Kennedy J. in *Landauer* v. *Asser* (1) as applicable to a case like the present. He was dealing with a case where in pursuance of the contract of sale and as part of the transaction a policy, or the equivalent of a policy, was handed over to the buyers, the policy being for more than the contract amount. It has no application to this case, where the sale to the defendants took place some time before, and where the claim is to recover moneys collected under independent policies effected by the original seller on his own account.

There must be judgment for the plaintiff for the amount claimed.

*Judgment for plaintiff.*

Solicitors for plaintiff: *Waltons & Co.*

Solicitors for defendants: *Thomas Cooper & Co.*

W. F. B.

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[IN THE COURT OF APPEAL.]

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*April* 27, 28; *May* 19.

## SMITH *v.* MARTIN AND THE CORPORATION OF KINGSTON-UPON-HULL.

*Negligence—Elementary Education—Local Education Authority—Provided School—Negligent Act of Teacher—Injury to Scholar—Relation of Master and Servant—Liability of Education Authority.*

The plaintiff, a girl aged about fourteen, attended a public elementary school provided by the defendant corporation, who were the local education authority for the district. The teachers in the school were appointed and paid, and were liable to be dismissed, by the defendant corporation. A teacher (who was joined as a defendant in the action) directed the plaintiff during school hours to poke the fire and draw out the damper of a stove in the teachers' common room, where the teacher proposed to have her lunch. While the plaintiff was carrying out the order her pinafore caught fire and she was seriously burned. At the trial the jury found that the act of the teacher was negligent, and the judge and the Court of Appeal held that there was evidence to support

(1) [1905] 2 K. B. 184, at p. 193.

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the finding. The judge, after argument, directed judgment to be entered for the defendant corporation, and the plaintiff appealed:—

*Held*, first, that the relation of master and servant existed between the local education authority and the teachers employed by them; and, secondly, that the act of the teacher was within the scope of her employment, which was not strictly confined to teaching alone; and that therefore the defendant corporation was liable to the plaintiff for the consequences of the teacher's negligent act.

APPEAL from the decision of Lawrance J. on further consideration of an action tried with a special jury at Leeds.

The action was in respect of personal injuries sustained by the plaintiff under the following circumstances. The defendants the Kingston-upon-Hull Corporation were the education authority for that borough, and as such had the control and management of a public elementary school provided by them, in which school the defendant Emily Martin was a teacher. The plaintiff, a girl of nearly fourteen, was a pupil in the class taught by the defendant Martin. She had reached the sixth standard, and at the time of the accident had already been through two courses of lessons in cookery and was taking a third course, and had also had two courses of lessons in laundry work. On the day of the accident the defendant Martin was not feeling well, and wished to have her lunch in a room near the schoolroom, used as a teachers' common room, in which room there was a fire, at which she intended to cook, or to heat, her lunch. Shortly before the recreation time, during which period she was going to have her lunch, the defendant Martin told the plaintiff to go to the teachers' room, poke the fire, and pull out the damper of the stove. The plaintiff went in obedience to the order, and, while in the act of poking the fire or pulling out the damper, her pinafore caught fire and she was seriously burned. The case against the defendant Martin was based upon the allegation that she acted "negligently and improperly and in violation of her duties for the safeguarding of the plaintiff"; the defendant Martin contended that in giving the order to a child who was perfectly competent to carry it out she had been guilty of no negligence and had subjected the plaintiff to no risk. The defendant corporation contended that no cause of action had been disclosed against them, even upon the assumption that the defendant Martin had been guilty of negligence in giving the order to the plaintiff. The jury found a

verdict for the plaintiff for 300*l.* damages. Upon further consideration, Lawrance J. held that he could not interfere with the verdict of the jury as regards the defendant Martin, and accordingly directed judgment to be entered against her. As regards the defendant corporation, the learned judge held that the act of the defendant Martin was not done by her as a part of the work of carrying on the school, but was done for her own private purposes, and that the corporation, having discharged their statutory duty of appointing a competent teacher, were not liable for acts of the teacher which had no relation to the actual educational work of the school; he therefore directed judgment to be entered for the corporation. The defendant Martin appealed, and a cross-appeal was brought by the plaintiff against that part of the judgment directing judgment for the corporation.

The appeal of the defendant Martin was heard first, but was dismissed without calling upon the plaintiff's counsel, the Court holding that it was impossible to say that there was no evidence of negligence fit for the consideration of the jury.

*Norman Craig, K.C.*, and *Longstaffe* argued for the defendant Martin.

The plaintiff's appeal against the judgment in favour of the defendant corporation was then heard.

*Tindal Atkinson, K.C.*, and *W. H. Owen*, for the plaintiff. On the principle of qui facit per alium facit per se, the corporation are liable for the negligent act of their teacher. Under the Education Acts, 1870 and 1902, the education authority has the sole right to appoint the teachers in a provided school; they pay them and have the power to dismiss them, and in the performance of their duties they from time to time exercise control over them. This is sufficient to create the relationship of master and servant between the corporation and their teachers. The decisions in *Ching* v. *Surrey County Council* (1) and *Morris* v. *Carnarvon County Council* (2) illustrate the extent of the liability of an education authority for the negligence of its subordinates

(1) [1910] 1 K. B. 736. (2) [1910] 1 K. B. 840.

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and are decisive of the present case. The liability of the education authority is not discharged by the mere appointment of a competent teacher; it extends to an act done by the teacher in the course of her authorized employment as a servant of the education authority: see *Citizens' Life Assurance Co.* v. *Brown.* (1) *Hall* v. *Lees* (2), upon which the defendant corporation rely, depended entirely upon the terms of the particular contract entered into between an association for the supply of nurses and the person to whom the nurse was supplied. [They also cited *Mersey Docks Trustees* v. *Gibbs* (3); *Hillyer* v. *St. Bartholomew's Hospital* (4); *Shrimpton* v. *Hertfordshire County Council.* (5)]

*Scott Fox, K.C.*, and *Compston*, for the Kingston-upon-Hull Corporation. The conduct of the teacher in asking the plaintiff to look after the fire in the teachers' room was not in itself a dangerous order. It is only desired to take this point formally, as the recent decision of the House of Lords in *Shrimpton* v. *Hertfordshire County Council* (5) makes it difficult to contend that there was no evidence of negligence that could be left to the jury. But, assuming that there was negligence on the part of the teacher, the corporation are not liable for her default. There is no authority which shews that a teacher in a public elementary school is a servant of the appointing body. The present cause of action is not founded on a contract between the plaintiff and the education authority. The obligation of the education authority under the Act of 1870 is to appoint an educational staff; the action is not for appointing an inefficient educational staff. The defendants have discharged their obligation by appointing a proper teacher, just as in *Hall* v. *Lees* (2) an association for the supply of nurses was held to have discharged its obligation by supplying a competent nurse. It may be that the teacher appointed by the education authority is bound to render some service when appointed, but that is not sufficient to create the relation of master and servant. In s. 35 of the Elementary Education Act, 1870, the teachers appointed under the Act are

(1) [1904] A. C. 423.
(2) [1904] 2 K. B. 602.
(3) (1866) 11 H. L. C. 686.
(4) [1909] 2 K. B. 820.
(5) (1911) 104 L. T. 145.

styled "officers," and an officer is not a servant: *Evans* v. *Liverpool Corporation* (1), which decision was approved in *Hillyer* v. *St. Bartholomew's Hospital.* (2) Even if it be assumed that the teacher is in the position of a servant of the education authority, yet, on the principle of *Limpus* v. *London General Omnibus Co.* (3), the defendant corporation are exempt from liability, for the act of the teacher had nothing to do with the purposes for which she was employed. Her act was not a part of the education she was employed to impart, and it was not done in the interest or for the benefit of the defendant corporation. As a servant of the corporation, the teacher had no right to tell the plaintiff to do her a personal service in her private room. The act was not within the scope of the defendant Martin's employment; the question whether it was so was not put to the jury, and it was a necessary part of the plaintiff's case. [They also cited *British Mutual Banking Co.* v. *Charnwood Forest Railway.* (4)]

*Cur. adv. vult.*

May 19. VAUGHAN WILLIAMS L.J. read the following judgment:—I think that this appeal should be allowed. I have read the judgments of Fletcher Moulton L.J. and Farwell L.J. and agree in the results of them and in their reasoning. I only wish to add that in the case of *Ching* v. *Surrey County Council* (5), which was, as this is, a case of a provided school, the argument was put forward, and overruled, that the managers were an independent statutory body which is not as a whole appointed by the county council, being partly appointed by the minor local authority, and therefore could not be considered as their agents or servants, and that such bodies, who in point of fact deal with the matters connected with the management of a school, do so as independent statutory bodies, by virtue of the provisions of the statute, and not as the delegates or agents of the county council; so that the principle qui facit per alium facit per se, by reason of which a principal or master is made responsible for the act or omission of his agent or servant, is not applicable. A similar,

(1) [1906] 1 K. B. 160.
(2) [1909] 2 K. B. 820.
(3) (1862) 1 H. & C. 526.
(4) (1887) 18 Q. B. D. 714.
(5) [1910] 1 K. B. 736.

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although not identical, argument was put before us, and is really disposed of by that case, as well as by *Shrimpton* v. *Hertfordshire County Council* (1) in the House of Lords. I think that the decision of Lawrance J. was wrong, and that this appeal should be allowed.

FLETCHER MOULTON L.J., read the following judgment:—In this appeal Mr. Scott Fox, who appeared for the defendants the Kingston-upon-Hull Corporation, prayed in aid the argument which was addressed to us on behalf of the teacher to the effect that there was no negligence in the teacher in asking the child to poke the fire and draw the damper. This he was entitled to do. As we had already decided that question, he abstained from repeating the argument on that point, and I do not propose to give any further judgment upon it except that I wish to refer explicitly to the decision of the House of Lords in *Shrimpton* v. *Hertfordshire County Council* (1), as it appears to me on further consideration that their decision has a direct bearing on the present case. In *Shrimpton's Case* (1) the House of Lords held that a jury was entitled to hold it to be negligence to allow a country girl of twelve years of age to ride to school in an ordinary brake without a conductor to help her in and out, even though she had been accustomed to ride in that way and in that brake for some months. Accepting this, as I must, as indicating the standard of care with regard to children of this age that the tribunal of final appeal holds it reasonable for a jury to adopt, I think it impossible to say that a jury was perverse in holding it to be negligent to send a child of about the same age wearing a print pinafore to poke the fire and draw out the damper in a grate of this construction with which she was not familiar.

The main contention on behalf of the education authority, and that to which the judge of first instance gave effect, was that it was not liable for the act of the teacher, first, because the relation of the education authority to the teacher was not that of master and servant, and, secondly, that, even if the teacher must be held to be under a contract of service with the education authority,

(1) 104 L. T. 145.

this particular act was so completely outside the scope of the teacher's employment that the employer was not liable in respect of it. With regard to the first point I confess that I am quite unable to follow the argument in favour of the education authority. The school was a provided school under the control of the defendant corporation as education authority. They had with regard to it all the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870—1900, and thus had the entire control of the school. It is true that they exercised this control and management through an education committee, but that would not alter their responsibility. It was contended that we ought to hold that the employment of a teacher is in pari materia with the employment of a physician, and that this case therefore came under the class of cases where it has been held that a person whose duty it is to provide medical attendance has discharged that duty when he has appointed a competent medical man, and that he is not responsible for the negligence of the doctor so appointed. The analogy, in my opinion, is a false one. The position of a medical man is in such matters a very special one and bears no resemblance to that of a teacher of an elementary school. The layman is presumably incapable of judging of the right treatment to be adopted by the medical man, and accordingly he is not required to interfere with it or even warranted in doing so. But the education authority can and ought to take cognizance of the way in which the teaching is given, and, although it is rightly guided to a great extent by the advice of the teacher, it can direct the teacher what to do and what not to do, and it is clear that he must obey. Speaking for myself, I can see nothing in the position of an elementary teacher, appointed by an education authority to carry out its statutory duties of providing education for the children under its care, which distinguishes the teacher, in respect of his being under a contract of service, from any other official, and the ordinary consequences as regards liability for the acts of a servant must attach in such a case.

But there remains the further question: was the direction given by the teacher to the plaintiff so completely outside the

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scope of the employment that the education authority is not liable for the consequences? There is no doubt that the facts of the case go some way to support this contention. They seem to be as follows. In the schoolhouse there was a room appropriated to the use of the teachers. It had a fire in it, and on the present occasion the teacher, who had been unwell for a few days, was minded to take her meal in that room instead of going to her home for the purpose. Accordingly during the lesson and shortly before recreation time (when she would take her meal) she sent the plaintiff to the teachers' room to poke the fire and to draw out the damper in order that she might be able to heat her food, and it was in obeying this command that the child's pinafore caught fire and she was injured. It was strongly contended on behalf of the education authority that such an order as this was not within her duty as teacher, and that her employer was no more liable in respect of it than if she had asked the child to run an errand for her in the street and the child had been injured in so doing. Notwithstanding the skilful argument of Mr. Scott Fox I am of opinion that in this case the education authority is liable. We must recognize that the position of a teacher is peculiar in this respect, that immediate obedience is expected on the part of the children, as otherwise it would be impossible to maintain that discipline which is so indispensable to effective teaching. It would not be reasonable to hold that children ought to be able to draw the line between what is within the intended ambit of the teacher's authority and that which is just outside of it, and to limit the liability of the education authority to orders given by the teacher which are such as she was intended to give. As was laid down in the case of *Limpus* v. *London General Omnibus Co.* (1), the real question is whether it was an act done in the course of the teacher's employment, and not whether it was within the scope of the authority given to her. In my opinion, the teacher was put in a position in which it was intended that her commands should be obeyed by the children, and the education authority is responsible for orders given by her in

(1) 1 H. & C. 526.

that position, such as the one we have to consider. It does not seem to me to have been an order which in its nature differed essentially from such an order as to shut the door of the school-room or to open the window. It is true that it related directly to a matter personal to the teacher, but she may well have thought that it was in the interests of her teaching that the act should be done, and that it was better that she should send one of the scholars to do it than that she should leave the class unattended to while she did it herself. A wide discretion in small matters such as this is in my opinion inseparable from the quasi-parental position of a teacher towards her class in such a school, and, without discussing what are the exact limits of such an authority as is thus given to her, I am of opinion that in the present case the act was one for which the education authority is liable, and that this appeal should be allowed.

FARWELL L.J. read the following judgment:—We have already held that we cannot interfere with the finding of the jury that the teacher was negligent in sending the child under the circumstances of the case to pull out the damper, and the question now remains whether the Corporation of Kingston-upon-Hull, being the education authority of the school, are also liable. The corporation deny liability on two grounds, either of which, if sound, would suffice to exonerate them. First, they deny that the teacher is their servant, and allege that their only duty is to appoint fit and proper persons as teachers, and that it is not suggested that the teacher was not a fit and proper person. Secondly, they contend that the act was not done by the teacher in the course of her employment and for her master's benefit.

As to the first contention, the school in question is a provided school, and the case is therefore free from any complication by the interposition of managers. By s. 5 of the Education Act of 1902 the corporation have the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870 to 1900; and these include the duty of providing sufficient accommodation in public elementary schools

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(Act of 1870, s. 5). Every such school "shall be conducted under the control and management" of the corporation subject to regulations therein mentioned (s. 14); every such school shall be maintained and kept efficient by the corporation (s. 18). The teachers are appointed by the corporation and hold office during their pleasure at such salaries as the corporation think fit, and are removable at their pleasure (s. 35); the corporation pay all salaries (Act of 1902, s. 7). It is true that the Board of Education issues regulations which bind the corporation, but no regulation material for any purpose that we have to consider has been called to our attention, nor am I aware of any such regulation. Under these circumstances all the incidents usually relied on to shew the existence of the relationship of master and servant exist in this case: the teacher was engaged by the corporation and paid by them; she was under their control, and could be dismissed by them. The two cases relied on by the corporation (*Evans* v. *Liverpool Corporation* (1) and *Hillyer* v. *St. Bartholomew's Hospital* (2)) are entirely different: the person alleged to be the servant in the first case was the consulting physician, and in the second the surgeon and anæsthetist, "professional men, employed by the defendants to exercise their profession to the best of their abilities according to their own discretion; but in exercising it they are in no way under the orders or bound to obey the directions of the defendants." (3) In *Hillyer's Case* (2) the nurses and carriers were treated as being servants for whose acts the hospital would be liable, but the plaintiffs failed to prove any case against them. (4) I am therefore of opinion that the first contention of the corporation fails.

It is contended in the second place that it was no part of the business of the teacher to send the child on any errand of her own, but that her business is confined to teaching. This is to draw a distinction between education and teaching which, if adopted as sound, would have a most prejudicial effect on these schools. In my opinion, the Education Acts are intended to provide for education in its truest and widest sense. Such education includes the inculcation of habits of order and obedience and courtesy: such

(1) [1906] 1 K. B. 160.
(2) [1909] 2 K. B. 820.
(3) [1909] 2 K. B. at p. 825.
(4) [1909] 2 K. B. at p. 827.

habits are taught by giving orders, and if such orders are reasonable and proper under the circumstances of the case, they are within the scope of the teacher's authority, even although they are not confined to bidding the child to read or write, to sit down or to stand up in school, or the like. It would be extravagant to say that a teacher has no business to ask a child to perform small acts of courtesy to herself or others, such as to fetch her pocket handkerchief from upstairs, to poke the fire in the teachers' room, to open the door for a visitor, or the like: it is said that these are for the teacher's own benefit and to save herself trouble, and not for the child's benefit, but I do not agree: not only is it good for the child to be taught to be unselfish and obliging, but the opportunity of running upstairs may often avoid punishment: the wise teacher, who sees a volatile child becoming fidgety, may well make the excuse of an errand for herself an outlet for the child's exuberance of spirits very much to the benefit of the child. Teachers must use their common sense, and it would be disastrous to hold that they can do nothing but teach. Then it is suggested that the act in this case cannot be for the master's benefit: I have recently delivered a judgment on this point in *Lloyd* v. *Grace, Smith & Co.* (1), and I will not repeat it: it is enough to say now that "benefit" does not mean pecuniary benefit only: an act done within the scope of the employment is by legal intendment for the benefit of the master, unless and until the master proves the contrary. Here, in addition to the considerations that I have already stated, and which are in my opinion quite sufficient, the corporation supply a common room in which the teachers sit, fitted with fireplace and oven so that they can cook and eat their dinners there if convenient, but they supply no one to look after the fires or the room; it is therefore necessary for the teachers to do it themselves: in the present case, the teacher might have gone herself, but if she had, she would have left her class unattended: it cannot be said that she chose an alternative beyond the scope of her employment in sending the child; such sending was within such employment, but she did it in a negligent manner: the corporation are therefore liable for

(1) Ante, p. 489.

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her negligence. I am therefore of opinion that this appeal must be allowed.

*Plaintiff's appeal allowed.*

Solicitors for plaintiff: *Windybank, Samuell & Lawrence, for B. Pearlman, Hull.*

Solicitors for defendant Martin: *Baker & Nairn, for A. M. Jackson & Co., Hull.*

Solicitors for defendants the Kingston-upon-Hull Corporation: *Sharpe, Pritchard & Co., for H. A. Learoyd, Hull.*

W. J. B.

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[IN THE COURT OF APPEAL.]

## CHAPLIN *v.* HICKS.

*Damages—Measure of—Breach of Contract—Remoteness—Inassessability.*

Where by contract a man has a right to belong to a limited class of competitors for a prize, a breach of that contract by reason of which he is prevented from continuing a member of the class and is thereby deprived of all chance of obtaining the prize is a breach in respect of which he may be entitled to recover substantial, and not merely nominal, damages.

The existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment.

*Richardson* v. *Mellish*, (1824) 2 Bing. 229, and *Watson* v. *Ambergate, &c., Railway*, (1850) 15 Jur. 448, discussed.

APPLICATION of the defendant for judgment or a new trial in an action tried by Pickford J. and a common jury.

On November 5, 1908, a letter from the defendant, a well-known actor and theatrical manager, was published in a London daily newspaper, in which he said that, with a view of dealing at once with the numerous applications continually being made to him by young ladies desirous of obtaining engagements as actresses, he was willing that the readers of that newspaper should by their votes select twelve ladies, to whom he would give engagements. On the four following days the offer was published in detail in the newspaper. Ladies were invited to

send their photographs to the newspaper by November 24, 1908, together with an application form, in which they were to insert name, address, and general personal description. The defendant, with the assistance of a committee, would then select twenty-four photographs to be published in the newspaper, and the readers of the newspaper would out of those select the twelve winners, to the first four of whom the defendant would give an engagement for three years at 5*l.* a week, to the second four an engagement for three years at 4*l.* a week, and to the third four an engagement for three years at 3*l.* a week. On November 10 the plaintiff sent in a signed application together with her photograph. The response to the defendant's offer was so great that in the issue of December 9 an alteration of the conditions of the competition was announced. It was stated that about six thousand photographs had been sent in, and that from these the defendant or his committee had selected about three hundred, which would be published in the newspaper in the following way: the United Kingdom would be divided into ten districts, and the photographs of the selected candidates in each district would be submitted to the readers of the newspaper in that district, who were to select by their votes those whom they considered the most beautiful. After the voting was completed the defendant would make an appointment to see the five ladies in each district whose photographs so published obtained the greatest number of votes, and from these fifty the defendant would himself select the twelve who would receive the promised engagements. The plaintiff assented to the alteration in the terms of the competition. The fifty photographs were then published with numbers appended to them in the newspaper, together with a ballot paper on which the reader of the newspaper registered his vote for the particular number which he preferred, and added his signature and address. On January 2, 1909, the poll closed; the plaintiff's name appeared as first in her particular section, and she became one of the fifty eligible for selection by the defendant. On January 4 the defendant's secretary wrote a letter to the plaintiff asking her to call at the Aldwych Theatre at 4 o'clock on Wednesday afternoon [January 6] to see the defendant. This letter was addressed to

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the plaintiff's London address, which was the only address given by the plaintiff in her application, and was delivered there by the first post on January 5. The plaintiff was at that time fulfilling an engagement at Dundee; the letter was at once re-addressed to Dundee, where it reached the plaintiff on January 6, much too late for her to keep an appointment in London on that afternoon. The other forty-nine ladies kept their appointments, and on January 6 the defendant made his final selection of the twelve, of whom the plaintiff was not one. The plaintiff made attempts, but unsuccessfully, to obtain another appointment with the defendant, and eventually brought the present action to recover damages on the ground that by reason of the defendant's breach of contract she had lost the chance of selection for an engagement. The jury found, in answer to a question put to them by the learned judge, that the defendant did not take reasonable means to give the plaintiff an opportunity of presenting herself for selection, and assessed the damages at 100*l*., for which sum Pickford J., after argument, directed judgment to be entered. The defendant appealed.

*McCardie* (*A. R. Churchill* with him), for the defendant. Assuming a breach of contract, the plaintiff is not entitled to substantial damages, but to nominal damages only. Either the damages do not flow directly from the breach and are too remote, or they are so contingent as to be incapable of assessment. The question has been discussed in actions against carriers for damages for loss or delay in the carriage of goods. In *Watson* v. *Ambergate, &c., Railway* (1), which was decided at a time when the rule as to notice of the purpose for which the goods were required affecting the damages for their loss had not been authoritatively formulated, the question arose of the damages recoverable for the loss of a plan and model of a machine for loading colliers from barges, the plan and model being intended to be used in a competition for prizes; the Court seems to have decided that the measure of damages for loss of the plan and model was the value of the plan and model, and that the loss of the chance of obtaining the prize was not

(1) 15 Jur. 448.

capable of assessment: there was, however, a difference of opinion, Patteson J. thinking that damages might be given for the loss of the chance, Erle J. thinking that they could not. In Mayne on Damages, 8th ed., p. 70, it is suggested that the view of Erle J. was correct, and the author puts the question thus: "Was the plaintiff's chance of winning the prize a matter of such an ascertainable value at the time of entering into the contract of carriage, as to have been capable of contemplation by both parties?" In *Simpson* v. *London and North Western Railway* (1), where the defendants had notice of the purpose for which the samples delivered to them for carriage were required, loss of profit was held to be a natural and probable result of failure to deliver them in time. But substantial damages cannot be recovered where the claim is merely for the loss of a benefit which might or might not have accrued to the plaintiff; they certainly cannot be recovered where, in ordinary language, the odds are against the plaintiff ever deriving any benefit from his contract; that is not a mere question for the jury in assessing the amount of damages.

[FLETCHER MOULTON L.J. Take the case of a tontine of a hundred persons, of whom only three are left; if one of the three were improperly struck out, would he not be entitled to substantial damages?]

It is submitted that he would be entitled to nominal damages only; if he were held to be entitled to substantial damages, it would only be because a member of a tontine has an acknowledged right in property. It is clear that the law recognizes the existence of a liability which is incapable of being estimated. Such cases were directly provided for by s. 31 of the Bankruptcy Act, 1869, where a future and contingent liability, declared by an order of the Court to be incapable of being fairly estimated, was declared to be not provable in bankruptcy: see *Hardy* v. *Fothergill*. (2) The recent decision of Jelf J. in *Sapwell* v. *Bass* (3) is a clear authority in favour of the defendant. The cases in which damages have been given for the loss of a probability, such as *Frost* v. *Knight* (4), are not in point; a

(1) (1876) 1 Q. B. D. 274.
(2) (1888) 13 App. Cas. 351.
(3) [1910] 2 K. B. 486.
(4) (1872) L. R. 7 Ex. 111.

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probability is very different from a chance, which is a non-assessable possibility.

[FARWELL L.J. referred to *Richardson* v. *Mellish*. (1)]

That is the only case in which the question of a contingency or of the approval of a third person has arisen in respect of an assessment of damages, and it does not conflict with the general rule that the existence of a contingency which is dependent on the volition of a third person renders the damages for a breach of contract incapable of assessment. [He also cited *Horne* v. *Midland Railway* (2); *Walker* v. *Goe* (3); *Maw* v. *Jones* (4); *Addis* v. *Gramophone Co.* (5); *Lagunas Nitrate Co.* v. *Lagunas Syndicate*. (6)]

*G. A. Scott*, for the plaintiff, was not called upon.

VAUGHAN WILLIAMS L.J. I am of opinion that this appeal should be dismissed. The plaintiff relies upon a contract alleged to have been made with the defendant, a contract under which she asserts that she obtained the opportunity of appearing in a competition in which considerable prizes were offered. I need not discuss the facts in any detail; so far as the contract and its breach are concerned, even if neither of them is admitted on the pleadings, the matter has been discussed by Mr. McCardie in his able argument upon the basis that there was a contract and that there was a breach of that contract. It is contended, however, that the breach of contract was such that the damages (if any) obtainable in respect of it could only be nominal. The argument for the defendant was based upon two propositions, first, that the damages were remote, and, secondly, that they were unassessable, and we have to deal with both those contentions.

As regards remoteness, the test that is generally applied is to see whether the damages sought to be recovered follow so naturally or by express declaration from the terms of the contract that they can be said to be the result of the breach. This generally resolves itself into the question whether the

(1) 2 Bing. 229.
(2) (1873) L. R. 8 C. P. 131.
(3) (1859) 4 H. & N. 350.
(4) (1890) 25 Q. B. D. 107.
(5) [1909] A. C. 488.
(6) [1899] 2 Ch. 392.

damages flowing from a breach of contract were such as must have been contemplated by the parties as a possible result of the breach. Now, the moment it is admitted that the contract was in effect one which gave the plaintiff a right to present herself and to take her chance of getting a prize, and the moment the jury find that she did not have a reasonable opportunity of presenting herself on the particular day, we have a breach attended by neglect of the defendant to give her a later opportunity; and when we get a breach of that sort and a claim for loss sustained in consequence of the failure to give the plaintiff an opportunity of taking part in the competition, it is impossible to say that such a result and such damages were not within the contemplation of the parties as the possible direct outcome of the breach of contract. I cannot think these damages are too remote, and I need say no more on the question of remoteness.

Then came the point that was more strenuously argued, that the damages were of such a nature as to be impossible of assessment. It was said that the plaintiff's chance of winning a prize turned on such a number of contingencies that it was impossible for any one, even after arriving at the conclusion that the plaintiff had lost her opportunity by the breach, to say that there was any assessable value of that loss. It is said that in a case which involves so many contingencies it is impossible to say what was the plaintiff's pecuniary loss. I am unable to agree with that contention. I agree that the presence of all the contingencies upon which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision. The proposition is that, whenever the contingencies on which the result depends are numerous and difficult to deal with, it is impossible to recover any damages for the loss of the chance or opportunity of winning the prize. In the present case I understand that there were fifty selected competitors, of whom the plaintiff was one, and twelve prizes, so that the average chance of each competitor was about one in four. Then it is said that the questions which might arise in the minds of the judges are so numerous that it is impossible to say that the case is one in which it

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:s possible to apply the doctrine of averages at all. I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable. I agree, however, that damages might be so unassessable that the doctrine of averages would be inapplicable because the necessary figures for working upon would not be forthcoming; there are several decisions, which I need not deal with, to that effect. I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages.

In early days when it was necessary to assess damages, no rules were laid down by the Courts to guide juries in the assessment of damages for breach of contract; it was left to the jury absolutely. But in course of time judges began to give advice to juries; as the stress of commerce increased, let us say between the reigns of Queen Elizabeth and Queen Victoria, rule after rule was suggested by way of advice to juries by the judges when damages for breach of contract had to be assessed. But from first to last there were, as there are now, many cases in which it was difficult to apply definite rules. In the case of a breach of a contract for the delivery of goods the damages are usually supplied by the fact of there being a market in which similar goods can be immediately bought, and the difference between the contract price and the price given for the substituted goods in the open market is the measure of damages; that rule has been always recognized. Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract. I do not wish to lay down any such rule as that a judge can in every case leave it to the jury to assess damages for a breach of contract. There are cases, no doubt, where the loss is so dependent on the mere unrestricted volition of another that it is impossible to say that there is any assessable loss resulting from

the breach. In the present case there is no such difficulty. It is true that no market can be said to exist. None of the fifty competitors could have gone into the market and sold her right; her right was a personal right and incapable of transfer. But a jury might well take the view that such a right, if it could have been transferred, would have been of such a value that every one would recognize that a good price could be obtained for it. My view is that under such circumstances as those in this case the assessment of damages was unquestionably for the jury. The jury came to the conclusion that the taking away from the plaintiff of the opportunity of competition, as one of a body of fifty, when twelve prizes were to be distributed, deprived the plaintiff of something which had a monetary value. I think that they were right and that this appeal fails.

FLETCHER MOULTON L.J. I have come to the same conclusion. The contract was made when the plaintiff, in answer to the defendant's announcement, sent up her photograph as one to be submitted to the committee by whom the selection was to be made. About six thousand photographs in all were sent in, and three hundred, of which the plaintiff's was one, were selected; these appear to have been voted upon by the readers of the newspaper, and the plaintiff was the first of the group or district to which, for the purposes of the competition, she belonged; by the conditions of the offer fifty altogether were in the end to come before the defendant, and twelve appointments were to be given to twelve members of that body of fifty. The jury have found that the defendant did not keep his engagement with the plaintiff; she was afforded no reasonable opportunity of submitting herself to the judgment of the tribunal that awarded the prizes, but was excluded from the limited competition for which by the terms of the contract she had become eligible and had therefore no chance of winning a prize.

Mr. McCardie does not deny that there is a contract, nor that its terms are as the plaintiff alleges them to be, nor that it is enforceable, but he contends that the plaintiff can only recover nominal damages, say one shilling. To start with, he puts it thus: where the expectation of the plaintiff depends on a

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contingency, only nominal damages are recoverable. Upon examination, this principle is obviously much too wide; everything that can happen in the future depends on a contingency, and such a principle would deprive a plaintiff of anything beyond nominal damages for a breach of contract where the damages could not be assessed with mathematical accuracy. The learned counsel admitted that it was very difficult to formulate his proposition, but he ultimately said that where the volition of another comes between the competitor and what he hopes to get under the contract, no damages can, as matter of law, be given. I can find no authority for that proposition; in fact, the decision in *Richardson* v. *Mellish* (1) is obviously in the teeth of it. I do not rely, however, on that or on any other authority; I would rather consider what is the right of a plaintiff as regards damages for breach of a contract, and regarding it as a matter of broad general principle, I do not think that any such distinction as that suggested by Mr. McCardie can be drawn. The Common Law Courts never enforced contracts specifically, as was done in equity; if a contract was broken, the common law held that an adequate solatium was to be found in a pecuniary sum, that is, in the damages assessed by a jury. But there is no other universal principle as to the amount of damages than that it is the aim of the law to ensure that a person whose contract has been broken shall be placed as near as possible in the same position as if it had not. The assessment is sometimes a matter of great difficulty. It is impossible in many cases to regard the damage that has followed the breach as that for which the plaintiff is to be compensated, for the injury to the plaintiff may depend on matters which have nothing to do with the defendant. For example, an innkeeper furnishes a chaise to a son to drive to see his dying father; the chaise breaks down; the son arrives too late to see his father, who has cut him out of his will in his disappointment at his not coming to see him; in such a case it is obvious that the actual damage to the plaintiff has nothing to do with the contract to supply the chaise. Therefore at an early stage the limitation was imposed that damages for breach of a contract must be such as might naturally

(1) 2 Bing. 229.

be supposed to be in the contemplation of the parties at the time the contract was entered into; damages, in order to be recoverable, must be such as arise out of the contract and are not extraneous to it. This limitation has been appealed to here. It has been contended in the present case that the damages are too remote; that they are not the natural consequences of a breach with regard to which the parties intended to contract. To my mind the contention that they are too remote is unsustainable. The very object and scope of the contract were to give the plaintiff the chance of being selected as a prize-winner, and the refusal of that chance is the breach of contract complained of and in respect of which damages are claimed as compensation for the exclusion of the plaintiff from the limited class of competitors. In my judgment nothing more directly flowing from the contract and the intentions of the parties can well be found.

Then the learned counsel takes up a more hopeful position. He says that the damages are difficult to assess, because it is impossible to say that the plaintiff would have obtained any prize. This is the only point of importance left for our consideration. Is expulsion from a limited class of competitors an injury? To my mind there can be only one answer to that question; it is an injury and may be a very substantial one. Therefore the plaintiff starts with an unchallengeable case of injury, and the damages given in respect of it should be equivalent to the loss. But it is said that the damages cannot be arrived at because it is impossible to estimate the quantum of the reasonable probability of the plaintiff's being a prize-winner. I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case. There are no doubt well-settled rules as to the measure of damages in certain cases, but such accepted rules are only applicable where the breach is one that frequently occurs. In such cases the Court weighs the pros and cons and gives advice, and I may almost say directions, to the jury as regards the measure of damages. This is especially the case in actions relating to the sale of goods of a class for which there is an active

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and ready market. But in most cases it may be said that there is no recognized measure of damages, and that the jury must give what they think to be an adequate solatium under all the circumstances of the case. Is there any such rule as that, where the result of a contract depends on the volition of an independent party, the law shuts its eyes to the wrong and says that there are no damages? Such a rule, if it existed, would work great wrong. Let us take the case of a man under a contract of service to serve as a second-class clerk for five years at a salary of 200*l.* a year, which expressly provides that, at the end of that period, out of every five second-class clerks two first-class clerks will be chosen at a salary of 500*l.* a year. If such a clause is embodied in the contract, it is clear that a person thinking of applying for the position would reckon that he would have the advantage of being one of five persons from whom the two first-class clerks must be chosen, and that that might be a very substantial portion of the consideration for his appointment. If, after he has taken the post and worked under the contract of service, the employers repudiate the obligation, is he to have no remedy? He has sustained a very real loss, and there can be no possible reason why the law should not leave it to the jury to estimate the value of that of which he has been deprived. Where by contract a man has a right to belong to a limited class of competitors, he is possessed of something of value, and it is the duty of the jury to estimate the pecuniary value of that advantage if it is taken from him. The present case is a typical one. From a body of six thousand, who sent in their photographs, a smaller body of fifty was formed, of which the plaintiff was one, and among that smaller body twelve prizes were allotted for distribution; by reason of the defendant's breach of contract she has lost all the advantage of being in the limited competition, and she is entitled to have her loss estimated. I cannot lay down any rule as to the measure of damages in such a case; this must be left to the good sense of the jury. They must of course give effect to the consideration that the plaintiff's chance is only one out of four and that they cannot tell whether she would have ultimately proved to be the winner. But having considered all this they may well think that

it is of considerable pecuniary value to have got into so small a class, and they must assess the damages accordingly.

This consideration decides the case, but I wish to refer to the decision of Jelf J. in *Sapwell* v. *Bass*. (1) That decision was, in my opinion, right on the facts of the particular case. The plaintiff had acquired by contract a right to send a mare during the following year to a renowned stallion belonging to the defendant, and the defendant broke his contract. The right to send the mare was coupled with the payment of a fee of 300 guineas. Jelf J. held that for the breach of contract the plaintiff was only entitled to nominal damages. The ground of the decision was that there was no evidence to shew that the right was worth more to the plaintiff than the 300 guineas which he would have had to pay for the services of the stallion, and that there was therefore no evidence that the damages were more than nominal. If, however, the learned judge meant to hold that there were no damages for breach of an undertaking to serve the mare, there is, in my opinion, no justification for such a view. The contract gave the plaintiff a right of considerable value, one for which many people would give money; therefore to hold that the plaintiff was entitled to no damages for being deprived of such a right because the final result depended on a contingency or chance would have been a misdirection. This appeal must be dismissed.

Farwell L.J. I agree. The fallacy of Mr. McCardie's argument consists, in my opinion, in his failing to distinguish between the remoteness of the damage claimed and its assessment; the question of remoteness is for the judge; the assessment of damages is for the jury. I agree in thinking that the contention that the damages in the present case are too remote is unarguable; the case could not have been withdrawn from the jury, for damage might result not only from the loss of the opportunity of winning a prize but also from the slur upon the plaintiff in her professional capacity, which might result in a diminution of the value of her services as an actress when she applied for an engagement. In *Maw* v. *Jones* (2), which raised

(1) [1910] 2 K. B. 486.

(2) 25 Q. B. D. 107.

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the question of the measure of damages in an action for the wrongful dismissal of an apprentice, Lord Coleridge C.J. said: "The plaintiff was entitled to recover for all the damage flowing naturally from the breach, and in considering what that would include the jury might take into account the difficulty that the plaintiff as a discharged apprentice would have in obtaining employment elsewhere." The jury may well have considered the difficulty which the plaintiff, after being passed over in this fashion by the defendant, would have in obtaining as good an appointment as before. I think, therefore, that the question of remoteness of damage does not arise here.

Then comes the question as to the ascertainment of the amount. In actions for unliquidated damages this is ordinarily for the jury, and to my mind it is not correct to say that the present is an exceptional case. It is contended that the amount of the plaintiff's loss is so entirely a matter of pure chance as to be incapable of assessment. I cannot for this purpose draw any distinction between a chance and a probability. In the Oxford English Dictionary one of the definitions of "chance" is "a possibility or probability of anything happening, as distinct from a certainty," and a citation is given from Reid's Intellectual Powers, "The doctrine of chances is a branch of mathematics little more than an hundred years old." The two words "chance" and "probability" may be treated as being practically interchangeable, though it may be that the one is somewhat less definite than the other. The necessary ingredients of such an action are all present; the defendant has committed a breach of his contract, the damages claimed are a reasonable and probable consequence of that breach, and loss has accrued to the plaintiff at the time of action. It is obvious, of course, that the chance or probability may in a given case be so slender that a jury could not properly give more than nominal damages, say one shilling; if they had done so in the present case, it would have been entirely a question for them, and this Court could not have interfered. But in the present competition we find chance upon chance, two of which the plaintiff had succeeded in passing; from being one of six thousand she had become a member of a class of fifty, and, as I understand it, was first in her particular division by the votes

of readers of the paper; out of those fifty there were to be selected twelve prize-winners; it is obvious that her chances were then far greater and more easily assessable than when she was only one of the original six thousand. If the plaintiff had never been selected at all, the case would have been very different; but that was not the case. In my opinion the existence of a contingency, which is dependent on the volition of a third person, is not enough to justify us in saying that the damages are incapable of assessment. The case of *Richardson* v. *Mellish* (1) affords a very good illustration on this point. There the question was raised whether in an action for breach of contract the jury could give damages for the loss of two voyages as captain of an East India-man, though the second had not been accomplished at the time of action, and in his judgment Best C.J. said (2): "It is clear that the plaintiff could only be appointed for one voyage, for the appointment of master is renewed every voyage. But though that is the case, may not parties look to that which is the practice of the East India Company, that though they renew the appointment, they renew it in the same person? If that practice be legal, may I not say, if you had appointed me for the first voyage, I should have continued for the second? You have deprived me of the profits I should have made not only on the first voyage, but on the second also. It requires no legal head to decide this: common sense says, you are not to be paid for consequences which might not turn up in your favour; but the plaintiff is entitled to have a compensation for being deprived of that which almost to a certainty happens in these cases." Now, the expression "almost to a certainty" means that the contemplated event is very probable, and the fact that it is very probable only increases the amount of damages which a jury would give. It is obvious that if the East India Company were in the habit of appointing the same man master for the next voyage, the chance of appointment of the plaintiff in that case was a very good one, and the jury assessed the damages accordingly. It is clear upon the authorities that damage resulting from the loss of a chance of winning in a competition is assessable. In

(1) 2 Bing. 229. (2) 2 Bing. at p. 239.

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*Ex parte Waters, In re Hoyle* (1), Mellish L.J. said: "It is difficult to imagine any kind of contract (I speak of business contracts) in respect of which, if broken before, or put an end to by, the bankruptcy, a jury could not point out a fair way of estimating the damages under the direction of the judge." I agree with Mr. McCardie that the principles on which the Bankruptcy Court acts are wider and more extensive than those applicable to cases of mere breach of contract, for the effect of bankruptcy proceedings is to make a clean sweep of contractual relations; but it makes no difference whether the proceedings are taken for closing a bankrupt's estate or for payment of compensation to a plaintiff who has been injured by breach of a contract. I see no difficulty in the assessment of damage in the present case. It was a question for the jury, and, that being so, this Court is not entitled to interfere with their finding. The case of *Watson* v. *Ambergate, &c., Railway* (2) affords us no assistance at all. That decision is discussed by the learned author of Sedgwick on Damages (3), who says: "The question of damages was not necessarily involved in this decision. In a similar case in Pennsylvania, the opinion expressed in it was disapproved, the Court holding that the value of the opportunity to compete for the premium furnished the measure of the plaintiff's damages. If the company were informed of the object of the transmission, the loss of the privilege of the competition was in view of both parties when they entered into the contract; and if not, the loss was still the result of the carrier's negligent breach. But it appearing from the evidence of one of the committee by whom the prizes were awarded, that the plaintiff must at any rate have failed to obtain the prize, he was held entitled to nominal damages only: *Adams Express Co.* v. *Egbert.* (4)" To a great extent that expresses my own view; where a railway company has no notice of the special purpose for which goods are to be carried, it is not possible to hold them liable for the special damages resulting from their loss. I need only refer shortly to *Sapwell* v. *Bass.* (5) In that case there was no jury, and Jelf J., exercising the

(1) (1873) L. R. 8 Ch. 562, at p. 567.
(2) 15 Jur. 448.
(3) 7th ed., i. 128.
(4) (1860) 36 Pa. 360.
(5) [1910] 2 K. B. 486.

functions of a jury, did not see his way towards assessing the damages at a larger sum than one shilling; if there had been a jury, and the learned judge had withdrawn the case from them on the question of the amount of damages, I think he would have been wrong. And in the present case, if the jury had given only a shilling, we could not have interfered. I agree that the appeal must be dismissed.

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*Appeal dismissed.*

Solicitors for plaintiff: *Chas. Anderson & Co.*
Solicitors for defendant: *J. D. Langton & Passmore.*

W J. B.

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[IN THE COURT OF APPEAL.]

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## BILLERICAY RURAL DISTRICT COUNCIL *v.* GUARDIANS OF THE POOR OF THE POPLAR POOR LAW UNION AND KEELING.

*Highway—Extraordinary Traffic—Average Expense of repairing Highways in the Neighbourhood — Extraordinary Expenses — Damage recoverable—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict.* c. 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict.* c. 29), *s.* 12.

In an action by a local authority under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by the Locomotives Act, 1898, s. 12, to recover expenses as having been incurred by them in the repair of a highway by reason of damage arising from extraordinary traffic, the local authority must, in order to succeed, prove that those expenses were "extraordinary," and, for the purpose of determining whether they were so, regard must be had to the average expense of repairing similar highways in the neighbourhood.

APPEAL from the judgment of Channell J. (1) in an action tried by him without a jury.

The action was brought, under the Highways and Locomotives (Amendment) Act, 1878, s. 23, as amended by the Locomotives Act, 1898, s. 12, by the plaintiffs, the Billericay Rural District Council, as being the authority liable to repair a certain highway in parishes within their district, against the guardians of the

(1) Reported [1911] 1 K. B. 734.

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Poplar Union, and one Keeling, a contractor employed by them, to recover the sum of 290*l.* 2*s.* 9*d.*, as being expenses incurred by the plaintiffs by reason of damage arising from extraordinary traffic conducted by or in consequence of the order of the defendants on the said highway. The alleged extraordinary traffic consisted in the passage on the highway during the months of June, July, August, and September, 1909, of traction engines drawing trucks containing large quantities of manure from a railway station to a workhouse or farm colony belonging to the Poplar guardians by or in consequence of the orders of the defendants. The learned judge found on the evidence that there was a case, though only a slight one, in favour of traffic proved to have been so conducted by order of the defendants being "extraordinary traffic," and that there was also a case, but not a very strong one, that this traffic had to a small extent damaged the highway in question. These findings of the learned judge were not challenged by the defendants on the appeal. Certain tables had been supplied by the plaintiffs to the defendants shewing the yearly amounts of the highway rates levied in the district through which the highway in question ran during the five years ending 1910, the effect of which tables was held by the learned judge to be to shew that there had been no substantial increase in the highway rates for the year in which the extraordinary traffic took place, as compared with those of previous years, but the plaintiffs did not put in evidence any figures with regard to the average expense of repairing highways comparable with the highway in question in the neighbourhood, or with regard to the average expenses of repairing the highway in question. Evidence was given by the surveyors of the plaintiffs, which was, in substance, to the effect that repairs had been done to the road in question which had brought it up to a very high standard of excellence in March, 1909, and that, in consequence of the effect upon the road produced by the extraordinary traffic conducted by or in consequence of the orders of the defendants, it became necessary to expend the sums claimed in repairing it at the end of 1909, whereas, but for that extraordinary traffic, in their opinion only very slight repair, costing only a pound or two, would have been necessary,

having regard to the condition in which the road was in March, 1909. The learned judge held, in substance (1), that the plaintiffs had failed to supply sufficient evidence of any figures to shew that the expenses incurred by the plaintiffs in consequence of the traffic conducted on the road by order of the defendants were "extraordinary," and he therefore gave judgment for the defendants. (2)

*Macmorran, K.C.*, and *E. J. Naldrett*, for the plaintiffs. According to the judgment of the Court of Appeal delivered by Bowen L.J. in *Hill* v. *Thomas* (3), the expression "extraordinary traffic" in s. 23 of the Highways and Locomotives (Amendment) Act, 1878, includes all traffic which, either in quantity or quality, or in both, is in excess of the ordinary traffic on the road. There was evidence in this case that the traffic brought by the defendants upon the road in question was "extraordinary" within the meaning of the expression "extraordinary traffic," as explained in that judgment. (4) [They also cited on this point *Etherley*

(1) See [1911] 1 K. B. 738—740.

(2) Highways and Locomotives (Amendment) Act, 1878, s. 23: "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

Locomotives Act, 1898, s. 12, sub-s. 1: "Section twenty-three of the Highways and Locomotives (Amendment) Act 1878 (which relates to the recovery of expenses of extraordinary traffic) shall be amended as follows: (*a*) Expenses under that section shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that sum in the High Court . . . . (*c*) There shall be substituted for the words 'by whose order' the words 'by or in consequence of whose order.'"

(3) [1893] 2 Q. B. 333.

(4) There was considerable discussion during the argument as to the exact effect of that judgment, the Lords Justices respectively indicating difficulties which occurred to them in the interpretation of its

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*Grange Coal Co., Ld.* v. *Auckland District Highway Board* (1); *Reg.* v. *Ellis.* (2)]

The learned judge, though he found that there had been extraordinary traffic, and some damage caused thereby to the road in question, appears to have given judgment for the defendants on the ground that the highway rates for the particular year were not substantially increased, and therefore the plaintiffs had not proved that any "extraordinary" expense had been incurred in the repair of the road in question. He held in effect that, on the true construction of s. 23, the plaintiffs could only recover if the expenses incurred by them in repairing the road in question had been extraordinary, and that, in order to prove that those expenses had been extraordinary, it was necessary to shew that the highway rates for the year had been increased so as to throw an undue burden on the ratepayers. That is not the true test. The question under the latter part of s. 23 is whether the expense incurred has been extraordinary as regards the particular road: that is, really, whether the particular road has been damaged by excessive weight or extraordinary traffic; for, if it has, there has been extraordinary damage to the road beyond the wear and tear which would have been occasioned by the ordinary traffic, and the local authority is entitled to recover in respect of that damage. It is quite immaterial that, possibly, from various causes less than usual may have had to be spent on other roads in the district, so that the total highway rate has not been increased. Upon the true construction of the section, it was not necessary for the plaintiffs to put in any evidence to shew what had been the average expense of repairing similar highways in the neighbourhood. Witnesses called for the plaintiffs gave evidence to the effect that the road in question had been put into thorough repair prior to the end of March, 1909, and that, but for the

terms. The defendants' counsel, however, ultimately intimated that the defendants did not propose to contest the learned judge's finding that there had been extraordinary traffic in the case before the Court, and, consequently, it did not become necessary for the Court to come to any decision as to what constituted "extraordinary traffic" within the meaning of the section.

(1) [1894] 1 Q. B. 37.

(2) (1882) 8 Q. B. D. 466.

extraordinary traffic brought upon it by the defendants, practically nothing would have had to be spent upon it in the subsequent year. There was, therefore, sufficient proof of damage to it by the extraordinary traffic within the meaning of the latter part of s. 23, and that was all that was necessary. It is sufficient under the section for the plaintiffs to shew that there has been extraordinary traffic, and that by that traffic the road has been damaged, and it follows that the expense of repairing that damage is extraordinary expense. "Extraordinary expense" means, for the purposes of the latter part of the section, expense which would not have had to be incurred but for the extraordinary traffic. The words in the latter part of the section are, not "such extraordinary expenses," but "such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid." The section provides, for the protection of the public and the ratepayers, that a certain certificate must be given by the surveyor of the local authority as a condition precedent to proceedings under the section, and, in giving that certificate, the surveyor must have regard to the average expenses of the repair of highways in the neighbourhood, but the latter part of the section has nothing to do with such average.

[VAUGHAN WILLIAMS L.J. It does not appear that the plaintiffs produced in evidence any definite figures with regard to the average expenditure in former years on this particular road.]

It is submitted that under the circumstances it was not necessary for them to do so. The case of *Bromley Rural District Council* v. *Chittenden* (1) is a direct authority in the plaintiffs' favour. [They also cited *Lord Aveland* v. *Lucas*. (2)]

*C. A. Russell, K.C.* (*A. A. Bethune* with him), for the Poplar guardians. The defendants do not propose to dispute the finding of the learned judge that there was a case, though a weak case, of extraordinary traffic and damage caused thereby to the road in question. Assuming that to be so, the plaintiffs wholly failed to establish a right to recover the expenses which they claimed under the section. The construction put upon

(1) (1906) 70 J. P. 409. (2) (1879) 5 C. P. D. 211; (1880) 5 C. P. D. 351.

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the latter part of s. 23 by the learned judge, and, it is submitted, the right construction of it, is that the words "such expenses as" &c. mean "such extraordinary expenses as" &c., i.e., expenses that are "extraordinary" in the sense in which that term is used in the earlier part of the section, which deals with the certificate of the surveyor, namely, extraordinary, having regard to the average expense of repairing similar highways in the neighbourhood. It is impossible to suppose that the Legislature contemplated the application of a different test for ascertaining whether expenses are extraordinary as regards the latter part of the section from that which is applicable for the purposes of the certificate of the surveyor mentioned in the earlier part of the section, and that the local authority should be entitled to recover, although the evidence at the trial shewed that the certificate of the surveyor was not true in fact. The question in *Bromley Rural District Council* v. *Chittenden* (1) related to discovery of documents, and the construction of s. 23 only indirectly came in question there. It is submitted that the view taken in that case ought not to be followed in the present. The intention of the statute was to give a test by which to ascertain whether the expenditure caused by the extraordinary traffic was extraordinary, namely, by taking the average expense of repairing comparable highways in the neighbourhood. It is impossible to determine whether expenditure is extraordinary except by taking an average, and it might be very difficult, if not impossible, to do that merely with regard to the particular road. In order to sustain the onus of proof cast on the local authority by the latter part of the section, they must prove such facts as would entitle the surveyor, if laid before him, to give the certificate referred to in the earlier part of the section. The party sought to be charged ought not to be charged in respect of his user of the road so far as it is not in excess of the normal user of the road; he can only be charged in respect of the amount by which his user of the road has been excessive. It would be really impossible to make the necessary calculation with any nicety by reference to the user of the particular road, and therefore the

(1) 70 J. P. 409.

Legislature has provided that it shall be done by reference to the average cost of repairing highways in the neighbourhood. The plaintiffs in the present case failed to give evidence of any figures which could be adopted as the measure of extraordinary expense incurred by them in the repair of the road in question.

*C. E. Jones* (*Sir F. Low, K.C.*, with him), for the defendant Keeling.

*Macmorran, K.C.*, for the plaintiffs, in reply.

VAUGHAN WILLIAMS L.J. This is a case which at one time during the argument seemed likely to raise certain questions which might be rather difficult to decide, but it ultimately became plain that these questions did not arise. We must take it, on the view of the defendants themselves, that this is a case in which it is common ground that, although the case as to extraordinary traffic may be a weak case, still we are to deal with the appeal on the basis that there was extraordinary traffic, and that was what the learned judge found.

Under those circumstances the next question is a question as to the damage resulting from the extraordinary traffic, or rather, not only the damage resulting from it, but the expense to which the local authority has been put by reason of the damage arising therefrom. The sole matter that we really have to decide here is this. The learned judge, after finding that there was a slight case in favour of the traffic being considered extraordinary, and also a case, though not a strong one, that it had damaged the road, concludes his judgment by saying: "Has there been under those circumstances extraordinary expense? I cannot say that I am satisfied that there has. I think, therefore, that this is a somewhat weak case as to the extraordinary traffic, and not a strong case as to the amount of damage, and that the general result is that, although I think that this traffic has caused a certain amount of expense to the plaintiffs, which they would not have had, if the traffic had not gone over the road, yet I cannot say that it is extraordinary in the sense that the section means, or even that it has at all substantially increased the burden on the ratepayers of the district. In my judgment, therefore, the necessary conditions with regard to this special

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statutory right to recover this special statutory sum have not been made out by the plaintiffs; and, as the burden of proof is upon them, and they have failed to satisfy me that there has been such extraordinary traffic as to cause extraordinary expense, I must give judgment for the defendants." I think we must accept that conclusion, and that under those circumstances this appeal must fail.

I will now try to state shortly what I think was necessary in order to constitute this proof, the burden of which the learned judge said was on the plaintiffs, and for which he said they had failed to supply the necessary evidence. In order to deal with this question, it is better that one should read first s. 23 of the Highways and Locomotives (Amendment) Act, 1878, which runs thus: "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid." Upon the terms of the section it is plain that the Legislature intended that, in these cases where a claim is made by the local authority to be recouped the extra expenses to which they have been put by reason of the damage caused by an individual in his use of a road, whether the damage has been caused by extraordinary traffic, which is the suggestion in this case, or by excessive weight, no proceedings should be commenced for the recovery of such expenses unless as a condition precedent the certificate mentioned at the beginning of the section has been given, and I think that the Legislature also intended that, in dealing with the question whether such expenses had been incurred, the Court should have regard to the average mentioned at the beginning of the section. That being

so, it follows that one of the matters with which the learned judge had to deal was to be dealt with by him having regard to this average, and he says that he had not the materials to enable him to do so.

Before saying any more as to s. 23, I want to say one or two words as to the facts here. This is not a case in which it is suggested that there has been any wrongful user of this road in kind; it is a road which is adapted in its foundation and make-up for user by traction engines or traction engines with trucks behind. Therefore this is eminently a case in which there is no sort of tort involved in the fact that the road was used for this purpose, and all that is really complained of is that the user was extraordinary. Under those circumstances the learned judge had to deal with the question whether there had been such extraordinary traffic as to cause extraordinary expense. I have already said that, in determining that matter, he had to take into consideration this damage which is described in the last words of the section as "damage arising from such weight or traffic as aforesaid." The outcome of that obligation is that really, if you worked it out in detail, you would have to begin with ascertaining the date at which the road was constructed, how long it had been in use; and, really, when you came to deal with the extra expense to which it was alleged that the local authority had been put, you would have, not to charge the individual who was alleged to have caused the extra expense with the full amount of repair, but to give him credit for so much of his user as was not extraordinary. He would be entitled to have credit for the ordinary user, and, of course, the amount of that credit must necessarily depend upon the time during which the extraordinary user took place. That being so, the question the learned judge had to ask himself was, Have I the materials in order to arrive at a conclusion in this case on this question? It is really not only common ground here that the plaintiffs did not give any sufficient figures upon which to base a conclusion as to this matter of average, but in my judgment—I do not blame them for doing so at all—they took the view that it was unnecessary for them to do so. I think they were wrong in that view. It

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appears to me, therefore, that the learned judge was right when he said that he had not, having regard to the terms of the 23rd section, sufficient materials to deal with this question of average. It will be observed that the average expense which the learned judge had to take into consideration seems to be, not the average expense of repairing this road, but the average expense of repairing highways in that neighbourhood. Under these circumstances I am clear that the learned judge was right in saying that the plaintiffs did not supply him with any materials to enable him to find the amount which ought to be charged against these defendants in respect of this extraordinary traffic and the consequent extraordinary expense.

I should like to add this to what I have said. If you have to find out how much of the expense incurred is attributable to the extraordinary user as distinguishable from the ordinary user, you obviously have to make a calculation which it is not only very difficult but almost impossible to arrive at with real accuracy. I think it was under those circumstances, and with that fact in view, that the Legislature passed this 23rd section. They first say that, as a condition precedent to recovering this extraordinary expense resulting from the extraordinary traffic conducted by order of the defendants, you must have this certificate of the surveyor. Then carrying into the calculation the matters that the surveyor has to inquire into and certify, you have to make a calculation which is so difficult to deal with accurately that it is only reasonable that, instead of leaving it to the plaintiffs to prove in pounds, shillings, and pence the exact proportion which is attributable to the extraordinary user, it must be proved that it is such an extraordinary user as that the expense of repairing the damage makes the expenses during the time in question (I have already dealt with the question as to what the time would be) in excess of the average expenditure, not in respect of this particular road, but in respect of the repairing of highways in the neighbourhood. Therefore, under these circumstances, I think that this appeal fails, and that the judgment of the Court below must be upheld.

FLETCHER MOULTON L.J. At the present day the essential characteristic of the law with regard to user of our roads is that every member of the public is entitled to use them properly as much as he needs. That is a principle which did not always obtain. It is well within the memory of many present that the great main roads of the country were at one time maintained under turnpike trusts, and payment was roughly dependent upon user. That state of things has entirely changed. Each of us uses the road that is most convenient to him as much as he wants, and the fact that, from the position of his dwelling or the nature of his business, he uses one road more than another, and perhaps one road more than any other single member of the public uses it, makes him in no sense more liable for the upkeep of that road than any other member of the public. Probably his user of that road implies that he uses others less; but, whether it does or does not, the community have come definitely to the conclusion that absolute freedom of user coupled with communal upkeep of the roads is the wisest thing for the nation. That state of things would not only have continued, but would probably have been made more and more universal, if it had not been for the fact that in recent times a very considerable modification in the nature of the vehicles by which roads are used has taken place; and I think that it was by reason of the vista of possibilities which that opened up that in 1878 the Legislature recognized that there might be a user of a road which was so excessive as to render it worth while to make an exception to this absolute freedom of user, and, in certain cases, where the user was of this new type, to throw a special liability on the person so using a road in order to defray the expenses caused by that user.

Accordingly this s. 23 of the Highways and Locomotives (Amendment) Act, 1878, was passed. But, before I consider it in detail, I wish to say that in my opinion there is no more dangerous guide in construing a remedial section like this than to assume that the Legislature intended to do ideal justice in all cases of the type referred to. On the contrary, I think that the Legislature acts wisely when it recognizes that the power of litigating such matters in the Law Courts is itself to some extent an evil; and it is impossible to read this clause and

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similar clauses in other Acts without seeing that the Legislature did not intend that these statutory remedies should apply excepting in cases of such a magnitude that it was worth while to bring the matter into Court. In this case, for instance, the Legislature has shewn, as it appears to me, an intention that the interference with freedom of user of the roads should only be possible in grave or substantial cases by enacting that there shall be a condition precedent without which the section cannot be appealed to. This condition precedent is very carefully defined, and in my opinion the language employed in defining it needs to be construed before we can satisfactorily deal with this case. The section runs as follows: "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority." Stopping there, we find that in the first place there has to be a certificate by a responsible officer, the surveyor. In my judgment it is not intended to be a certificate of opinion only, but one which cannot be given excepting in the presence of a certain state of facts, namely, that the expenses of repairing the road in question have been extraordinary compared with the average expense of maintaining the "highways in the neighbourhood," which I am willing to construe as meaning the comparable highways in the neighbourhood. The word "extraordinary" does not leave it a mere matter of opinion: it means that, unless the road in question is one in the case of which the cost of repairing the highway is higher than the average, the section does not apply at all. The necessity for such a certificate is a great security to the general public. It is only in cases where that which has happened has made the road an extraordinarily expensive one to the authority in comparison with its other highways of the like class that this certificate can be given at all. Supposing that that state of facts exists, what else has the certificate to state? It has to state that "extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon." There must

therefore be a certificate by this responsible officer that he is of opinion that this is so, and he must convince his authority that the reason why the road bill of that road has been higher than the average road bill of such roads is that damage has been caused to it by excessive weight or extraordinary traffic. Each one of these words requires very careful consideration in arriving at the true construction of the section. I do not think "damage" means fair wear and tear. I think "damage" means that the road has been injured because I associate with the terms "excessive weight" and "extraordinary traffic" the idea of something more than the road was intended normally to bear. I cannot think, for instance, that if a road is constructed to bear light traffic, or ordinary agricultural traffic, any amount of that traffic justifies the use of the word "damage" or the use of the words "extraordinary traffic." To my mind the traffic on a road is the justification of its existence. It is not right to put on the general community the expense of repairing roads that are useless. The more a road is used the more it justifies its position as a communally upkept road, and I do not think that in such a context you can say that the ordinary traffic of a road causes "damage" to it, nor do I think that the fact that the road is so well suited to the wants of the community that there has been a constant stream of proper traffic upon it constitutes what can fairly be called a case of "extraordinary traffic." Therefore I think that, having got a case in which the road bill is higher than the average, you have to consider whether that is due wholly or partly to damage to the road by excessive weight, or damage to the road by something which I do not think it is necessary here to define, but which is called "extraordinary traffic." To that extent the authority has a remedy over against the persons who have caused the excessive weight or the extraordinary traffic to go along the road. It must not be supposed that all extraordinary expenses of a road in a case in which the road bill is heavier than the average are necessarily expenses which can be recovered. They may arise from other than these two named causes. For instance a particular road may be far more liable to be flooded in wet weather than the other roads in the neighbourhood, and

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in consequence there may be a case where its road bill is heavier than the average, partly by reason of excessive weight or extraordinary traffic, and partly from the fact that it has been a very wet season. It may well be that the excess of the cost of the particular road over the average road bill is that which was meant by "extraordinary expenses," but the surveyor has to certify not only that there are extraordinary expenses, but also that some portion of them is due to one of these two named causes.

That being the nature of the condition precedent, and the requisite certificate having been given in this case, and the authority having been convinced thereby, this action is properly founded, but the question whether the defendants are liable does not depend upon that certificate. Their liability depends upon the latter part of the section. I am glad that the admission of counsel for the defendants has relieved us from the necessity of defining what is extraordinary traffic, because decisions have been cited which raise the possibility that one would have been obliged by authority to say that it had something to do with the past user of the road. I should be most reluctant to come to any conclusion which would amount to saying that the Legislature meant to penalize a person who by proper and suitable traffic had made use of a road which lay useless before, and that the measure of his burden is the extent to which he had thus justified the existence of the road. I cannot follow the reasoning upon which those decisions are based, and I trust that they will at some future date undergo reconsideration either in this Court or elsewhere. But happily we have not to consider these decisions, for it is admitted by Mr. Russell on behalf of the defendants that, though the case is a very weak one, there was here some excessive weight or extraordinary traffic, so that that portion of the section need not be construed by us.

Now I come to the end of the section which states what the authority can recover. They may recover "the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid." The plaintiffs contend that this

language gives the go-by entirely to all that has been said in the earlier part of the section with regard to the condition precedent, and that "such expenses" means ordinary or extraordinary expenses alike. After very carefully considering the language of the section, I am convinced that that is not the true construction. The section is not dealing with ordinary expenses, and hence the words "such expenses" must refer to the expenses spoken of in the earlier part of the section. The description of them as "incurred by such authority by reason of the damage arising from such weight or traffic" confirms this view. It appears to me that the true mode of construing the latter words of the section is by recognizing that they are elliptical; that "such expenses" means "extraordinary expenses," just as "such traffic" means "extraordinary traffic," and "such weight" means "excessive weight," and none the less because the word "such" has also to act as antecedent to the words "as may be proved." If I might paraphrase the words, I should say that they are equivalent to "the amount of such expenses so far as they may be proved," &c. They are in truth an elliptical contraction of "such expenses as far as they may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority." I do not think there was any intention when the words "such expenses" were used to depart from that to which the certificate referred. To hold otherwise would be to decide that, although the inquiry shewed that there were no extraordinary expenses, and the certificate ought not to have been given, the authority might recover ordinary expenses of repairing the road.

I wish now to apply what I have said to the facts of the present case. Neither party has gone into the evidence at any length. Each party has accepted the findings of the learned judge in his judgment. The findings of the learned judge, if properly understood, appear to amount to this: that he did not think that it was proved that the cost of this road had been above the average of like roads in the neighbourhood. It seems to me to be one of the principal roads in the district, and we are assured that the evidence, so far from shewing that the expense of this road was greater than the average throughout the

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neighbourhood, shews it to have been considerably less. I cannot read the judgment of the learned judge without coming to the conclusion that he thought that there was no material which would enable him to say that it was a case where there were extraordinary expenses at all, but that, on the contrary, the expense of repairing this road was not higher than the average expense of such roads in the neighbourhood. That being so, I do not think there is any material to justify us in applying this section at all. I do not think there are any "such expenses" as it is intended to apply to. The judge's finding is a finding of fact that the certificate ought not to have been given, because there was no extraordinary expense. Therefore so much of such expense as was caused by the damage arising from such weight or traffic was something which did not exist. Under these circumstances I can find neither damage nor extraordinary expense, and I think the learned judge was bound to dismiss this action on the ground that the plaintiffs had not made out their case. I rely especially on the following words in his judgment: "The real difficulty is that we have not got figures which would enable me to see whether the expense of this particular year on this particular road has or has not, or to what extent it has, exceeded the average expense of that particular road in previous years." I confess I should have preferred the sentence to have ended with "the average expense of roads in the neighbourhood," but the language of the judge is more in accordance with the decided cases, and, as the whole case of the plaintiffs was that this was a road so little used that it was less expensive than the average, the way in which the learned judge has stated it is too much, if anything, in favour of the plaintiffs. I think it is perfectly clear from his language that he thought that the plaintiffs had failed to shew him any figures to enable him to come to the conclusion that there were any such expenses on this road in this year as the section applies to. For these reasons I think the appeal ought to be dismissed.

BUCKLEY L.J. In favour of the plaintiffs the learned judge found, first, that extraordinary traffic upon this highway had

been proved, and, secondly, that that extraordinary traffic had damaged this highway. The plaintiffs are the appellants. There is no cross-appeal. Those facts, therefore, stand unchallenged before us. On those facts the learned judge had next to consider whether or not it was shewn that extraordinary expense had been incurred by reason of those facts. That question involved an investigation of the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878.

Before going into what the learned judge has said, I will address myself to what I think to be the true meaning of this section. It consists of two parts. The first part defines an event; the second part provides that in that event certain persons may recover something. The event is defined as follows. I read it shortly: "Where by a certificate of their surveyor it appears to the authority . . . . that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage" caused as mentioned in the section. The effect of those words in my judgment is that the surveyor in giving his certificate is not to set himself to find what was the average expense of repairing this particular highway. It is sufficient for him to take accounts which presumably will be accessible and available, and to ascertain that, in the case of "highways in the neighbourhood" (by which I understand to be meant highways comparable with this highway, e.g. as being used for agricultural purposes, or whatever the character of the neighbourhood may be), the average expense of repairing such a road is so much a yard or so much a rod. He is entitled to start with that. Then he has to ascertain, having regard to that average expense, whether extraordinary expenses have been incurred in respect of the particular highway by reason of the damage caused as mentioned in the section. If he were making up an account as between the highway authority and the person sought to be charged, the effect of those words "having regard to" &c. is not, in my opinion, that he has to give credit to the person sought to be charged for the average expense of repairing the highway over, say, a year, or over any other time. Suppose that the damage occasioned by

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the act of this person has taken place within a very short time, say a week. He would have been entitled in the course of, say, a week to wear out the highway to a certain extent without paying anything for it—he would be entitled to give it a week's ordinary wear and tear. He would be chargeable with the difference of the expense of restoring the road between the excessive wear and tear and the ordinary wear and tear. "Having regard to the average expense" &c. means, I think, that you are to assume that this road was repairable in respect of ordinary wear and tear at such expense as you find to be the average expense in respect of roads of that class; and then, having made that assumption, you are to ascertain,—and for this purpose you must have regard to the time of user amongst other things,—what is the difference between the expense caused by the excessive use and the expense caused by what would have been ordinary or reasonable use for the time with reference to which you have to make your calculation. That, I think, is the way in which the surveyor has to proceed. A reasonable view of the section is this: every person who uses the highway is entitled to wear it out to a certain extent; he is not entitled, having regard to this section, to wear it out to an excessive extent by excessive weight or extraordinary traffic; find the difference between those two, and, in ascertaining that difference, have regard to the fact that, taking one road with another over the neighbourhood, the average expense of repair is what results from taking the figures relating to highways in the neighbourhood and making the calculation. That, I think, is the duty of the surveyor so far as regards the first branch of the section.

The second branch is this: when the surveyor has gone into that calculation and certified as required by the section, then the authority may recover "the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by reason of the damage." The word "such" there does not, in my judgment, send one back to the earlier portion of the section. The words "such expenses" in this connection mean "such expenses as may be proved to have been incurred" &c. The word "such" and the word "as" are correlative. The word "such," I think, refers only to the

words "as may be proved" &c. But, having said that, it seems to me that it does not make very much difference to the true construction of the section. One of the Lords Justices who have preceded me has expressed the opinion that this word "such" throws one back to the earlier portion of the section. I do not think that is so. But the same result may be, and I think is, arrived at in another way. The words are "such expenses as may be proved . . . . to have been incurred by reason of the damage." You have to ascertain, therefore, what are the expenses incurred by reason of the damage. That would mean, if I am right in my view of the section, the difference between the expenses incurred by reason of the excessive user and the expenses incurred by reason of what would have been legitimate user—the difference between the expenses incurred in respect of the excessive wearing out of the road and the expenses incurred in respect of the legitimate wearing out of the road. If that is so, the words mean the same thing as is expressed by other words at the beginning of the same section.

Now I have concluded what I have to say upon the section, except that there is one most salient fact, and that is that in the certificate portion of the section what the surveyor has to ascertain is the extraordinary expenses incurred in repairing *such* highway—that is to say the particular highway in question—and in the latter part of the section the expenses are those proved to the satisfaction of the Court to have been incurred by reason of the damage arising from such weight or traffic. That damage is necessarily damage upon the particular highway, so that what you have here to ascertain is the extraordinary expense attributable to the user of the particular highway, and, in ascertaining that, you are entitled, and under the section are bound, to have regard to the average expense of repairing other highways, that is, other comparable highways, in the neighbourhood.

That I understand to be the true construction of the section, and I go on to see what the learned judge has said. With all respect to him I think that the portions of his judgment to which I am now going to refer are erroneous for reasons which I will state. After finding that there was extraordinary traffic,

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and that there was damage from that extraordinary traffic, he says this: "Now, if that were all, I think I should have to find that the plaintiffs were entitled to recover something, but, as I have explained, according to my view of the section I do not think it is all, because I think that, in addition to the existence of damage, the damage must be such as to cause extraordinary expense." So far I entirely agree. Next comes this, from which I differ—"which I think means, in substance, that the highway rate of the district must be substantially increased by it so as to make it an unfair burden upon the other ratepayers." Of course the highway rate of the district will not be raised if the larger expenditure upon this road is compensated by a smaller expenditure upon other roads, and those are the circumstances to which the learned judge is referring. He goes on to say a little further down: "What is shewn is that the expenditure in this particular year did not exceed the average of the previous five years." By the context it is quite plain that he means there not that the expenditure upon this particular road in this particular year did not, but that the expenditure generally of the highway authority in this particular year did not, exceed the average of the previous five years. That, I think, was the wrong test. The same thing is, I think, made still more clear a little further on where he says: "What happened was that in the year 1908 the expenditure was considerably below the average of the previous years." Now the amounts to which he is referring are amounts referring not to this particular road, but to the total expenditure in the parishes to which he alludes. He proceeds: "But adding together the two years, 1908 and 1909, and dividing by two, you get a figure which is very little in excess of the previous years, so that the state of things seems to have been that the expenditure was slightly increasing year by year, varying a little between the particular years; and, when it was a little less in one year, being consequentially a little more in the next. In that state of things for the year in question when the extraordinary expense was supposed to have been incurred —in one sense expenses have been incurred, I think, with reference to this—in that year the expenses of these parishes taking them all together are pretty nearly the same as taking them separately,

or just about the average." The figures which the learned judge is considering there were figures not relating to this road at all; those figures had not been got out. The figures upon which he was commenting were figures of aggregate expenditure by the parish upon all its roads, and what he was investigating was whether the facts were such as to shew that the highway rate of the district was substantially increased, and he came to the conclusion that it was not.

Now in all that, as it appears to me, the learned judge was setting himself to find that which was not relevant. The relevant question was not whether the highway rate went up or down—whether the extraordinary expense on this road had been compensated by diminished expenses on another road; the question was, in the language of the section, whether extraordinary expenses had been incurred in repairing such highway, that is to say this particular highway. It is singular that, having discussed that matter up to that point, the learned judge then seems to have taken up, without noticing it, a totally different question, because his next sentence is this: "But the real difficulty is that we have not got figures which would enable me to see whether the expense of this particular year on this particular road has or has not, or to what extent it has, exceeded the average expense of that particular road in previous years." There he was indicating, I think, the true question to try. It is not the question he had been discussing before, because what he goes on to say is that he had no material to enable him to try that which was, I think, the real question to try, namely, whether in respect of this particular road extraordinary expense had been incurred or not.

I have thought it necessary to deal with this question at this length, because my view of the judgment is that, so far as it states and describes the true effect of the section, it is erroneous, but, so far as it arrives at the conclusion that the plaintiffs, from the deficiency of evidence, had not succeeded in making out their case, the judgment is right. It is a fact, as I have gathered the facts, that these plaintiffs did not prove, certainly did not prove to the satisfaction of the learned judge who heard the witnesses, that in respect of this particular year

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there had been extraordinary expense of any amount which the learned judge could determine. On that ground it seems to me that the judgment under appeal must be sustained. The plaintiffs fail, not because they might not have had a case for recovering something, for I think that they might, but by reason of the fact that they did not give evidence to support their case. On this ground I think this appeal must be dismissed.

*Appeal dismissed.*

Solicitors for plaintiffs: *Indermaur & Brown, for Lewis & Quennell, Brentwood.*

Solicitor for defendants the Poplar Guardians: *E. J. Marsh.*

Solicitors for defendant Keeling: *W. Hilliard & Ward.*

E. L.

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1911 *July* 11.

## PARRISH *v.* MAYOR, &c., OF HACKNEY.

*Rates — Metropolis — Quinquennial Valuation — Provisional List — "Subsequently made"—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 47, *sub-ss.* 8, 10.

A valuation list is not "made" within s. 47, sub-s. 8, of the Valuation (Metropolis) Act, 1869, until it is finally approved by the assessment committee.

The plaintiff was the occupier of licensed premises within the defendants' borough, and in the quinquennial valuation list of 1905 his property was assessed at gross value 400*l.*, rateable value 334*l.* After the Finance (1909-10) Act, 1910, was passed the value of the premises was diminished, and they were inserted in a provisional list made under s. 47 of the Valuation (Metropolis) Act, 1869, at gross value 319*l.*, rateable value 266*l.* A copy of this list was served on the plaintiff on June 30, 1910, and the list thereupon came into operation. In the quinquennial valuation list made in 1910, which was sealed by the defendants on May 30 and finally approved by the assessment committee on October 31, 1910, the premises were assessed at 180*l.* gross and 150*l.* rateable value. This list came into force on April 6, 1911:—

*Held*, that the quinquennial list was "made" when it was finally approved; that it was therefore "made" subsequently to the provisional list; that under s. 47, sub-s. 8, the provisional list ceased to be

operative on April 6, 1911; and that the plaintiff was entitled to be rated on 150*l.* only and to have the amount overpaid by him repaid.

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In this action the plaintiff, who was the occupier of licensed premises within the defendants' borough which had been inserted in the quinquennial valuation list made in 1905 for the parish in which the premises were situate, asked for a declaration that a rate of April 12, 1911, was illegal and unauthorized so far as the gross and rateable values were different from those fixed by the quinquennial valuation list made in 1910. The plaintiff also asked for an injunction and the return of money paid in respect of rates.

It appeared that in the quinquennial valuation list made in 1905 for the parish in which the premises were situate they were assessed at gross value 400*l.*, rateable value 334*l.* After the Finance (1909-10) Act, 1910, was passed the value of the premises was depreciated, and, in accordance with the decision in *Rex* v. *Shoreditch Assessment Committee* (1), they were inserted in a provisional list made under s. 47 of the Valuation (Metropolis) Act, 1869. In this list as finally approved by the assessment committee the plaintiff's premises were assessed at gross value 319*l.*, rateable value 266*l.* A copy of this list so far as it concerned the premises, together with the notice required by s. 47, sub-s. 3, of the Act of 1869, was served on the plaintiff on June 30, 1910, and by virtue of s. 47, sub-s. 8 (2), the provisional list thereupon came into operation.

In the quinquennial valuation list made in 1910, to which the common seal of the defendants was affixed on May 30, 1910, the premises were assessed at gross value 400*l.*, rateable value 334*l.* The plaintiff objected, and in the list as finally determined on October 31, 1910, the assessment of the premises was given as gross value 180*l.*, rateable value 150*l.* Under s. 43 of the Act of 1869 this quinquennial list came into force on April 6, 1911, and

(1) [1910] 2 K. B. 859.

(2) Valuation of Property (Metropolis) Act, 1869, s. 47: "(8.) A provisional list, signed as aforesaid, shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which is subsequently made comes into force."

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the plaintiff contended that under s. 47, sub-s. 8, the provisional list thereupon ceased to be operative, and that the quinquennial list was from that day the valuation list in force in the parish. On April 12, 1911, the defendants made a general rate, payable in two instalments, for the parish. They rated the plaintiff's premises at 266*l.* and claimed 53*l.* 4*s.* from him. The plaintiff claimed that the rateable value should have been that appearing in the quinquennial list, namely, 150*l.*, and that he ought only to have been called upon to pay 30*l.* In respect of general rates during the period from June 30, 1910, to March 31, 1911, he paid to the defendants 79*l.* 16*s.*, calculated upon the rateable value 266*l.* given in the provisional list, and he claimed under s. 47, sub-s. 10, of the Act of 1869 repayment of 34*l.* 16*s.*, being the excess beyond what he would have paid on an assessment of 150*l.*

The defendants contended that the provisional list was still in force and had not ceased to operate on April 6, 1911, inasmuch as the quinquennial valuation not having been made subsequently did not displace it.

*Ryde, K.C.*, and *E. M. Konstam*, for the plaintiff. The question turns on the construction of the Valuation (Metropolis) Act, 1869. The scheme of that Act provides for three kinds of valuation lists, namely, quinquennial, supplemental, and provisional lists. The lists have to be prepared in this instance by the defendants, who are now under the London Government Act, 1899, the overseers of the borough and parish. By s. 6 of the Act of 1869 the overseers "shall make and sign a valuation list." By s. 7 "after the valuation list is signed" it is to be dealt with by the assessment committee appointed under the Union Assessment Committee Act, 1862. The list has to be approved by the surveyor of taxes, and, by s. 14, revised and finally approved by the assessment committee. Then ss. 18 to 22 and 33 to 41 provide for appeals to special sessions or assessment sessions against the lists.

Sect. 42 fixes the times within which proceedings in making valuation lists are to be done. By sub-s. (1.) the overseers shall "make and deposit" the valuation list before June 1 in the first year after the passing of the Act; (2.) the overseers are to transmit

the list to the assessment committee within so many days; (4.) the assessment committee shall revise the list before October 1 in the same year, and (8.) "shall finally approve and send the valuation list to the overseers," &c., before November 1 in the same year. By s. 43 the list as approved is, subject to alterations on appeal, to come into force on April 6 of the year succeeding that in which it is made, and is to last for five years subject to alterations made by supplemental or provisional lists. By s. 46 the mode of revising the lists every five years is prescribed, and by sub-s. 1 in each of the first four years of such period a supplemental list is to be made out, shewing alterations and containing only hereditaments that have been altered. By sub-s. 5, "In each of the last four years of such period the valuation list which was in force on the day before the commencement of each such year, together with and as altered by the supplemental list, if any, which comes into force at the commencement of such year, shall be the valuation list which is in force during that year." By s. 47 a provisional list is to be made if in the course of any year the value of any hereditament is increased or diminished. Sub-s. 8 provides that "A provisional list, signed as aforesaid, shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which is subsequently made comes into force." Under sub-s. 10 the plaintiff is entitled to repayment of what he has overpaid on the value stated in the provisional list. In the present case the provisional list was served on the plaintiff on June 30, 1910, and thereupon came into operation and remained in force only until April 6, 1911, when the quinquennial list made in 1910 came into operation. That quinquennial list was made subsequently to June 30, 1910, inasmuch as, although it was sealed by the defendants on May 30, 1910, it was not finally approved till October 31, 1910. Otherwise this provisional list may, if no supplemental lists are necessary, remain in force for six years. It cannot be supposed that the Legislature intended such a result, if, for instance, the property were burnt down. There is no appeal

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against a provisional list: *Assessment Committee of Fulham Union* v. *Wells.* (1) If this provisional list remains in force till a supplemental list is made in 1911 the plaintiff may lose the benefit of a possible drop in the value of the rateable hereditament. A quinquennial list cannot be altered by a provisional list in this way: *The Queen* v. *Poplar Union Assessment Committee* (2); *Ellis* v. *Camberwell Assessment Committee.* (3) The Act is loosely drawn and it cannot be assumed that the word "made" is used in the same sense throughout.

*C. A. Russell, K.C.*, and *J. M. Stone*, for the defendants. The word "made" in s. 47, sub-s. 8, of the Act of 1869 refers to what happened on May 30, 1910, when the list was sealed, not to the final approval of the list nor to any other event. It means the date when the list is "made and signed" within s. 6. It may be conceded that the meaning of the word "made" as used in the Act varies according to the particular context; but there is a clear distinction between the final revision and the original making. The plaintiff has to shew a list made after May 30, 1910. The meaning of sub-s. 10 of s. 47 is controlled by the words "during the time that it is in force." So long as it is in force it is the proper valuation which ratepayers ought to pay; although if another list comes into force money which has thus been paid can be recovered. It is quite possible under the Act for a provisional list to remain in force for more than a year: Ryde's Rating Appeals, 1886–1890, p. 33. Whether it does so depends merely upon the dates. A quinquennial list is not a revision within s. 46 so as to enable the plaintiff to recover under s. 47, sub-s. 10, the amount which he has overpaid. There is no reason why an owner of licensed premises who has been put on a provisional list at a reduced assessment in the same manner as the plaintiff should get such an advantage over other ratepayers.

*Ryde, K.C.*, in reply.

WARRINGTON J. The question in this case is whether the plaintiff is to pay rates assessed on the value of his house, as settled by the quinquennial valuation list of last year, or whether

(1) (1888) 20 Q. B. D. 749. (2) (1884) 13 Q. B. D. 364.
(3) [1900] 1 Q. B. 68; on appeal, [1900] A. C. 510.

he is to pay rates on the value of the house as stated in a provisional list made in the year 1910, and the point arises on sub-s. 8 of s. 47 of the Valuation (Metropolis) Act of 1869. That sub-section provides that a provisional list shall continue in force until the first list (supplemental or other) which is subsequently made comes into force. The provisional list in the present case came into operation on June 30, 1910. The quinquennial valuation list was made and signed by the overseers (I use the two words advisedly) on May 30, 1910. In accordance with the provisions of the Act it had to undergo revision by the assessment committee; that revision was completed on October 31, when it was finally approved, and it came into force on April 6 in the present year. The plaintiff says that the provisional list continued in force until April 6 of this year and no longer. The defendants say that it is still in force; that no list (supplemental or other) has yet been made subsequently to it, and that for that reason it still continues in force. The whole question turns upon the expression in the 8th sub-section of s. 47 "subsequently made." The defendants say the quinquennial valuation was, for the purposes of that sub-section, made on May 30, 1910; the plaintiff that it was not made until a date subsequently to June 30. I have to determine which of these two contentions is right.

First of all, the general provisions of the Valuation (Metropolis) Act of 1869, with reference to this matter, are as follows. The overseers before June 1, 1870, and before June 1 in every subsequent year bearing a denomination of 5, that is to say, 1875, 1880, and so on, were directed by the Act to make and sign a valuation list. That list was then subject to revision by the assessment committee, and the revision was to be completed by November 1 in the same year, 1870, and subsequent years denominated by a multiple of 5, and was then to come into force, subject to an appeal to the judicial authority, on April 6 in the following year, that is 1871, and so forth. But to meet cases of alteration in value during the quinquennial period it was further provided that in each year a supplemental list should be made in reference to, or including in it, hereditaments which had suffered an alteration, resulting in either an increase

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or a decrease in value. That supplemental list was subject to revision in exactly the same way as the original list, and with the same provisions as to time; and that was to come into operation on April 6 following the year in which the process of revising it and so forth had gone on. But the Act provided still further machinery for meeting alterations in value, and that is described in the Act as the provisional list. Now the provisional list might be made up at any time, and it comes into operation as soon as notice of it is served on the occupier. It was subject to revision by the assessment committee, but was not subject to any appeal to the judicial authority; and then again, speaking in general, and expressing no opinion for the moment on the construction of the Act, the Act provided by that 8th sub-section of s. 47, and by the 10th sub-section, reading them together, that the provisional list should be a part of the valuation list for the time being in force, and should itself continue in force until the valuation list subsequently to be made should itself come into operation or come into force; that is to say it was strictly provisional, to be superseded by the next definite list, supplemental or otherwise, which should come into force.

Now the facts with regard to the hereditaments in question are these, and they give rise to this point, which I have to decide, and which appears never to have arisen before: in the quinquennial valuation list which was made in the year 1905, and came into force on April 6, 1906, the rateable value of the premises was 334*l.* On April 29 the Finance Act of 1910 came into operation; the occupier insisted that the effect of that Act was to cause an alteration in the value of the particular hereditaments, and required a provisional list in reference to those hereditaments to be made. In accordance with the decision in the case of *Rex* v. *Shoreditch Assessment Committee* (1) the provisional list was made. In that list the rateable value was 266*l.*, and in the quinquennial valuation the rateable value was 150*l.*, and the defendants, as I have said, insist that the house is still to be rated on the 266*l.* assessment, whilst the plaintiff says it should be rated on the 150*l.* assessment, and demands repayment of the rates which have been paid on the higher assessment.

(1) [1910] 2 K. B. 859.

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What is the meaning of sub-s. 8 of s. 47? I will read it again: "A provisional list, signed as aforesaid,"—that is, signed by the clerk of the assessment committee—"shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which is subsequently made comes into force." Now, what is meant by a list subsequently made? It is obvious that what is being referred to in this sub-section in the first place is a list which is operative, because it is referred to as a list which is to come into force, and how, under this Act, is an operative list made? Plainly not by the writing out, by the overseers or their clerk, of a list of hereditaments with a value placed against them; not even by the writing out of a list and the signature by the overseers. Before any list which can have any operative effect can come into force it has to undergo a revision by the assessment committee—(I say nothing about appeals; they stand on a different footing)—in other words the list which is here referred to is the result of a number of actions of a number of different people, and it is the sum of those actions which seems to me to be referred to by the expression "made."

I am looking for the moment at this section: if I had not read any other part of the Act, if I knew nothing else, and if I did not find the expression used anywhere else, I should have at once said that the making of the list meant the sum of that number of actions which resulted in the operative and final list. Am I prevented from giving that construction to this sub-section by the mode in which the verb "make" and its past tense "made" are used in this Act? In the first place, the Act is not drawn with precision. Of that I think there can be no question. Mr. Ryde has referred me to one or two places, even in this particular section, where the grammar, and the phraseology, is extremely unprecise. One therefore approaches the document without an inclination to suppose that the draftsman has used particular words in a particular sense, and used them in that sense throughout. Now let me see where this matter is referred to in the Act, and what is meant by the making of a list. The section that is relied upon is the

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6th section of the Act: "The overseers of every parish to which this Act extends, within the time in this Act mentioned, shall make and sign a valuation list of their parish in duplicate, in accordance with this Act." And the argument is that "made" in the 8th sub-section of s. 47 is the "make and sign" of the 6th section. Why? Why should I say that the word "made" is equivalent to "make and sign" in the 6th section, any more than it is equivalent to "make, sign, and revise," taking the 6th section and the provisions as to the assessment committee, s. 14, together? The real truth is that I do not believe, in that 6th section and in s. 47, sub-s. 8, the draftsman has intended to use the word "make" with any fixed or technical meaning attached to it. If one is to regard him as using the word "made" in the 8th sub-section with express reference to the 6th section, the thing becomes an absurdity, because the expression in the 6th section is not "the overseers shall make," but "they shall make and sign." Is the list "made" when the clerk writes the last word in the list itself, or is the date of the making the moment when the overseers sign it? That is not the date specified in sub-s. 8 of s. 47, so that precisely the same meaning cannot be given to the word "made" in sub-s. 8 as to "make" in the 6th section. It may be said to mean "make and sign," but it cannot be said to have exactly the same meaning as "make." I do not propose to go through the Act and find all the places in which the word "made" or the word "make" is used, because it is used in an enormous number of different contexts; it is used in reference to objections; it is used in reference to lists, and to all kinds of things. The nearest approach to a similar use is in the 46th section, with reference to the periodical revision, if one may call it so. The 1st sub-section provides that in each of the first four years of the period of five years a supplemental list shall, if necessary, be "made out" —that is a fresh expression; and then, in the 2nd sub-section, with regard to the quinquennial valuation, the phrase is different again: "In the fifth year of every such period the overseers shall 'make' a new valuation list": not "make and sign." I suppose the Act meant to say that the overseers shall make and sign a new valuation; but that is not the expression used. It is

only another example of the looseness of phraseology which is used in the Act, and the danger, therefore, of attempting to construe its provisions by attributing exactly the same force to the same word wherever you find it. It cannot be done. I have not to consider what the consequences will be, one way or the other; I have to say what is the meaning of the words the Legislature has used, and, in my opinion, in the 8th sub-section of s. 47 the Legislature is referring to the bundle of actions, if I may call it so, which result in the list, and not to one of those actions, namely, the preparation of the lists by the assessment committee. I think, therefore, that the provisional list in this case ceased to operate on April 6, 1911.

What is the result of that? The plaintiff says he has paid more than, according to the quinquennial list, he ought to have paid, and he demands the repayment of the money he has so paid; and for that he refers to, and relies upon, sub-s. 10 of s. 47, which provides as follows: "A provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force,"—and to apply that to the particular case therefore this provisional list formed part of the valuation list which was settled in the year 1905—"and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force, and the proportion of the current rate charged as before provided in this section, shall be levied accordingly;"—that is to say, he is to pay rates during the time it is in force on the footing of that being the correct assessment—"but if when the next revision of the valuation list takes place"—and the next revision of the valuation list, in my opinion, is the final settlement of the quinquennial valuation, 1910—"the list as approved and altered on appeal contains a smaller value for the hereditament comprised in a provisional list than the value stated in such provisional list, the amount of rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed."

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The plaintiff here has paid a tax the amount of which is larger than that which would have had to be paid if the hereditament had been assessed at the smaller value imposed upon it by the quinquennial valuation, and according to the words of sub-s. 10 it seems he is entitled to be repaid the excess. The statement of claim states that excess at the sum of 34*l.* 16*s.* I do not think that is disputed at all, and, therefore, there must be a declaration that the rateable value shewn in respect of the premises should have been the same as the rateable value appearing in the quinquennial valuation list which came into force on April 6, 1911, namely, 150*l.*, and that the plaintiff ought to have been rated in the sum of 30*l.* only; judgment for the 34*l.* 16*s.*; and costs.

Solicitors: *Godden, Son & Holme; W. A. Williams.*

H. C. R.

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*May* 18.

## CHUTER *v.* FREETH & POCOCK, LIMITED.

*Adulteration—Sale by Corporation—"Person"—False Warranty—Reason to believe—Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 20, *sub-s.* 6.

By s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, it is enacted that every person who, in respect of an article of food or drug sold by him, gives to the purchaser a false warranty in writing, shall be liable on summary conviction to a fine as therein mentioned, unless he proves that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true:—

*Held*, that a joint stock company incorporated under the Companies Acts can be convicted of an offence under the above enactment.

CASE stated by a magistrate sitting at the South Western Police Court.

On November 18, 1910, an information was preferred by Alfred Chuter, hereinafter called the appellant, against Freeth & Pocock, Limited, hereinafter called the respondents, for that they on September 26, 1910, in respect of an article of food, to wit, milk, sold by them to one John Jones, of which a portion was purchased of the said John Jones for analysis, did give to the

said John Jones a false warranty in writing contrary to the statute. (1)

The information was heard and dismissed on January 25, 1911.

On the hearing of the information the following facts were admitted or proved:—

The appellant was an inspector duly appointed by the mayor, aldermen, and councillors of the metropolitan borough of Battersea under the Sale of Food and Drugs Acts, 1875 to 1907.

The respondents were a limited company incorporated under the Companies Acts, 1862 to 1910, and carried on business as wholesale milk contractors.

On September 26, 1910, an agent for the appellant bought a pint of milk within the borough from one John Jones, who was taking the milk round in a churn on a barrow and was then selling the same to customers in the said borough.

The agent handed the pint of milk to the appellant, who forthwith notified to the said John Jones his intention to have the same analysed by the public analyst, and divided the milk into three parts, one of which he delivered to the said John Jones in accordance with s. 14 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63).

One third part of the pint of milk was duly submitted for analysis to Charles E. Cassal, public analyst for the metropolitan borough of Battersea, who on October 7, 1910, certified that the sample contained 7·5 per cent. of extraneous water and 92·5 per cent. of milk of genuine composition but of the poorest quality in non-fatty solids.

An information was thereupon laid by the appellant against John Jones on October 13, 1910, for that he had committed an

(1) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20, sub-s. 6: "Every person who, in respect of an article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing, shall be liable on summary conviction, for the first offence, to a fine not exceeding twenty pounds, for the second offence to a fine not exceeding fifty pounds, and for any subsequent offence to a fine not exceeding one hundred pounds, unless he proves to the satisfaction of the Court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true."

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offence against s. 6 of the Sale of Food and Drugs Act, 1875. On October 21, 1910, John Jones gave notice in writing, in accordance with s. 20 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), of his intention to rely as a defence under s. 25 of the Sale of Food and Drugs Act, 1875, upon a written warranty dated September 30, 1909, given by the respondents.

The summons against John Jones was heard and dismissed on the ground that he had proved that he had bought the milk as the same in nature, substance, and quality as that demanded of him by the appellant and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the milk was otherwise, and that he had sold it in the same state as when he purchased it.

An information was thereupon laid by the appellant against the respondents as above stated.

The milk from which the sample was taken was supplied to John Jones by the respondents under a contract in writing dated September 30, 1909. The contract contained a warranty that the milk should be pure and unskimmed and free from preservatives. The warranty was false; and the respondents' servants who supplied the milk had not reason to believe that the statements and descriptions contained in the warranty were true.

On behalf of the appellant it was contended that the respondents had committed an offence within the meaning of s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, upon the ground that the warranty was false, and that the respondents had not proved to the satisfaction of the Court that when they gave the warranty they had reason to believe that the statements or descriptions contained therein were true.

On behalf of the respondents it was contended that no offence had been committed within the meaning of the section upon the ground that the exempting clause making an innocent belief a defence to the summons implies that the offence can only be committed by a defendant who is capable of a mens rea, and that a corporation not being so capable cannot therefore commit the offence.

The magistrate, although upon the facts as above stated he would have convicted if the respondents' servants had been

principals in the matter, was yet of opinion that, as the exempting clause of the section implied that only such a person could commit the offence as was capable of believing, and as a corporation having no mind could not exercise that faculty, the respondents, being a corporation, were not liable under the section.

The question for the Court was whether the magistrate came to a correct decision in point of law.

*Barrington Ward*, for the appellant. The magistrate was wrong in holding that a corporation was incapable of giving a false warranty within the meaning of s. 20, sub-s. 6, of the Act of 1899. By s. 2, sub-s. 1, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), "person" includes corporation unless the contrary intention appears in the particular statute in which the word occurs. There is nothing to shew a contrary intention in this Act. A joint stock company can give a warranty: *Irving* v. *Callow Park Dairy Co.* (1) If the warranty is false, then prima facie an offence is committed. This is not a case where mens rea is the gist of the offence: *Pearks, Gunston & Tee* v. *Ward* (2); nor is it one where the punishment is imprisonment, as in *Hawke* v. *E. Hulton & Co.* (3) Reason to believe is all that is required in the way of mental capacity of the person who may be liable under this enactment, and a corporation which by its agents may be guilty of fraud or libel or malicious prosecution can also by its agents have reason to believe.

The respondents were not represented.

LORD ALVERSTONE C.J. In this case the magistrate refused to convict because in his view the party summoned was not in law capable of committing the offence. In my opinion he has taken a wrong view. The original purchaser, John Jones, having been summoned for an offence under s. 6 of the Act of 1875, set up the defence under s. 25 of that Act that he had bought under a written warranty to the effect that the article was the same in nature, substance, and quality as that demanded of him by the prosecutor, that he had no reason to believe at the time when he

(1) (1902) 87 L. T. 70. (2) [1902] 2 K. B. 1.
(3) [1909] 2 K. B. 93.

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Lord Alverstone C.J.

sold it that the article was otherwise, and that he sold it in the same state as when he purchased it. He established that defence and was discharged from the prosecution. The proceedings in question in this case were then taken under s. 20, sub-s. 6, of the Act of 1899. [His Lordship read the sub-section, and continued: ]

The magistrate has held that, inasmuch as "the person" who gives a false warranty is made liable unless he proves that when he gave the warranty "he had reason to believe" that the statements or descriptions contained therein were true, therefore "the person" cannot be construed as including a corporation, but must be limited to natural persons capable of belief. In my view that is too narrow a construction. Where a person is capable of giving a warranty that person is liable to a fine. There is no reason why a warranty should not be given by a corporation. It can give a warranty through its agents, and through its agents it can believe or not believe, as the case may be, that the statements in the warranty are true. A similar point has been raised in cases concerning the liability of a corporation in actions which, in the case of an individual, would involve an inquiry into a state of mind, such as fraud, libel, or malicious prosecution. It is well settled that a corporation may be liable in all those actions. Further, the question in this case has in substance been decided by Channell J. in *Pearks, Gunston & Tee* v. *Ward*. (1) Taking the principle of the Act into consideration there is no reason why in s. 20, sub-s. 6, "person" should not include corporation. The case must therefore go back to the magistrate.

PICKFORD and LUSH JJ. concurred.

*Appeal allowed.*

Solicitor for appellant: *Paul Caudwell.*

(1) [1902] 2 K. B. 1.

W. H. G.

## COPE *v.* SHARPE (No. 2).

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*April* 11.

*Trespass—Justification—Act done in Preservation of Property—Shooting Rights—Extinguishing Fire—Actual Necessity—Reasonable Act.*

If a fire breaks out on land, the tenant of the sporting rights is entitled to adopt such means on the land for extinguishing the fire as may in the circumstances be necessary for the preservation of his sporting rights. But to justify a trespass the intervention of the tenant must be actually necessary for the preservation of his game; it is not sufficient to justify a trespass that a reasonable man should think the intervention necessary, if in fact it was not necessary.

Appeal from the county court of Surrey holden at Aldershot.

The action was for trespass. The plaintiff, who was the owner of land, by an agreement dated February 1, 1909, let the shooting rights over the land to one Chase for a term of two years.

The defendant was bailiff and head gamekeeper to Chase.

During April and May, 1909, a number of heath fires broke out on the land of the plaintiff. On April 21, 1909, a serious fire broke out on the south side of a part of the shooting known as the Welsh Drive. There was a conflict of evidence as to the direction of the wind.

Some fifty men were engaged in beating out the fire. While they were thus occupied the defendant came along the Welsh Drive and set fire to strips or patches of heather at some considerable distance from the main fire and between it and the Welsh Drive. On being asked why he interfered he said the men did not know how to deal with a fire. Shortly afterwards the men succeeded in extinguishing the fire.

The plaintiff brought an action in the county court of Hampshire holden at Basingstoke. Judgment was given in that action for the plaintiff for nominal damages and an injunction. The defendant appealed; and the Divisional Court, being in some doubt as to whether the county court judge had directed his mind to the question whether the act of the defendant was necessary for the protection of his master's game, ordered a new trial to be had in the county court of Surrey holden at Aldershot: see the report of *Cope* v. *Sharpe*. (1) It was subsequently ordered

(1) [1910] 1 K. B. 168.

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that the trial should take place before a jury: see *Rex* v. *Surrey County Court Judge*. (1)

The second trial proved abortive as the jury could not agree upon a verdict. The case was thereupon heard for the third time. The county court judge left the following questions to the jury:—

(1.) Was the method adopted by the defendant in fact necessary for the protection of his master's property?

(2.) If not, was it reasonably necessary in the circumstances?

The jury answered the first question in the negative and the second in the affirmative. An argument ensued as to which question was as a matter of law the proper question to be left. The county court judge held that the second was the proper question. He therefore entered judgment for the defendant.

The plaintiff appealed.

*Parfitt, K.C.*, and *R. A. Willes*, for the plaintiff. It is common ground that a man may justify an entry upon the land of another if his entry is necessary for the preservation of his own property: *Cope* v. *Sharpe*. (2) The question in this case is what is meant by "necessary." The word may mean necessary in fact, or necessary in the view of a reasonable man who should find himself in the position of the owner of the property in danger. The first question put to the jury is based upon the principle that nothing short of actual necessity will justify an interference with the property of another; the second question is based on the principle that the judgment of the reasonable man in the circumstances is the measure of civil obligation. However it may be in an action on the case for negligence, in trespass to property the former principle is sound; the latter is not law. Nothing short of actual necessity justifies intermeddling with the corporeal property of others; for example, the public weal may justify a man in pulling down a burning house: *Maleverer* v. *Spinke* (3); and a passenger may cast cargo out of a barge to save life: *Mouse's Case*. (4) The second plea in *Dewey* v. *White* (5)

(1) [1910] 2 K. B. 410.
(2) [1910] 1 K. B. 168.
(3) (1538) Dyer, 35b, at 36b.
(4) (1608) 12 Rep. 63.
(5) (1827) Moo. & M. 56.

shews that actual necessity for interference must be proved. Good intention is not enough: *Carter* v. *Thomas*.(1) In *Kirk* v. *Gregory* (2) Bramwell B. gives a definition of the phrase "interference reasonably necessary" as used by him, explaining it as meaning that the property is in a position to require interference and that the interference was reasonably carried out. But that is not the meaning of the phrase as used in the second question put to the jury in this case, for here the answer to the first question establishes that the property did not require the interference of the defendant, while in the phrase as used by Bramwell B. it is assumed that the property does require interference. The conduct of a reasonable man is not the test of whether an act is or is not a trespass. Everybody, including the reasonable man, touches the property of others at his peril, and an honest mistake in acting for his own interest—*Hollins* v. *Fowler* (3)—or even an honest intention to act for the benefit of the true owner—*Kirk* v. *Gregory* (2); *Hiort* v. *Bott* (4)—will not avail to justify him if his interference is not required: see Pollock on Torts, 8th ed., p. 338.

*St. Gerrans* and *Nolan*, for the defendant. Actual necessity is not the test. It is most important that the legality of a man's act should be judged of at the time when he sets about it and not by matter ex post facto. It is only reasonable that, while deciding whether to intervene or abstain from intervening, his position should be ascertainable; otherwise none will intervene to save the property of others in danger for fear that unforeseen events may occur making unnecessary by an accident that which to all appearance was necessary for the safety of the property, and leaving him liable to an action in return for his good will. Hence all that is required in order to justify an interference is that the interference should be, in the words of Bramwell B. in *Kirk* v. *Gregory* (2), "reasonably necessary." If under the circumstances a reasonable man would have interfered, then the defendant is justified if he interferes.

[HAMILTON J. The introduction of the reasonable man and

(1) [1893] 1 Q .B. 673.
(2) (1876) 1 Ex. D. 55.
(3) (1875) L. R. 7 H. L. 757.
(4) (1874) L. R. 9 Ex. 86.

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his standards into the principles of the common law comes later in its history than the action of trespass and its appropriate pleas.]

Amphlett B. in *Kirk* v. *Gregory* (1) clearly indicates that "a reasonable necessity" for interfering is enough to justify an interference.

Counsel was not heard in reply.

PHILLIMORE J. In this case the plaintiff, Sir Anthony Cope, brought an action against the defendant, who was the head gamekeeper employed by the tenant of the shooting rights over the plaintiff's property. A series of fires had occurred burning the heather on the plaintiff's land and causing him considerable damage. On one occasion, while a large number of the plaintiff's men were putting out the fire, the defendant came upon the scene and set fire to certain strips of heather with the honest intention of preventing the fire from extending in the direction of, and doing injury to, his master's game. The plaintiff alleged that this was quite unnecessary as the fire was in fact extending in the other direction, and that the defendant was simply destroying useful heather. As there seemed to be a danger of these acts being repeated as often as the defendant thought necessary, this action was brought in the county court. At the first hearing the county court judge gave judgment for the plaintiff for nominal damages and granted an injunction to restrain a repetition of the defendant's acts. The defendant appealed, and the appeal was heard before Darling and Pickford JJ., who, thinking that the county court judge had not considered all the circumstances which might have enured as a justification of the defendant, ordered a new trial before another judge. (2) The line of defence which, if proved, would justify the defendant was indicated by Darling J. in these words (3): "What the defendant did was to burn the heather on one portion of the land solely with the object of preserving it in another part, and in my opinion the question whether the defendant was entitled to burn the heather which he did burn depends on whether it was necessary to do so

(1) 1 Ex. D. 55. (2) [1910] 1 K. B. 168.
(3) [1910] 1 K. B. at p. 171.

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in order to preserve the enjoyment of the rights over the land which had been granted by the plaintiff to his employer. If the defendant's act was necessary for that purpose, I think he committed no trespass; if it was not necessary, he did commit a trespass." Pickford J. said (1): "The county court judge apparently was of the opinion that, no matter what the defendant's necessity, and even if his act of setting fire to the strips of heather were the only possible way of preventing the loss of that which had been granted to his master by the plaintiff, still the act was a trespass for which there could in law be no justification. In my opinion there is no authority for saying that that is the law; on the contrary, in my opinion, if it can be shewn that the steps taken by the defendant to check the fire were the only possible means available for the preservation of his master's rights under the agreement, there is authority for saying that the defendant's act was not a trespass."

The case being remitted with these directions was heard again before a judge and jury; on that occasion the jury disagreed, and a third trial became necessary. At the third hearing a discussion took place as to the proper question to be left to the jury and ultimately the county court judge put to the jury the two questions suggested by counsel for the plaintiff and for the defendant respectively. The questions were (1.) "Was the method adopted by the defendant in fact necessary for the protection of his master's property?" and (2.) "If not, was it reasonably necessary in the circumstances?" To the first question the jury answered "No." To the second they answered "Yes." After argument on these findings the county court judge held that the second question was the right question to be left to the jury, and that by their answer thereto the defendant was justified. He therefore entered judgment for the defendant, but intimated that if the first question was the proper one he would, upon the answer to it, have entered judgment for the plaintiff for nominal damages and have granted an injunction.

We have now to decide which was the proper question. The first question raises no difficulty; but the second requires some interpretation. What is the meaning of the question, whether

(1) [1910] 1 K. B. at p. 172.

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the act of the defendant was "reasonably necessary"? We think it means, was the act of the defendant such an act as might in the circumstances, and did in fact, appear to him, as a reasonable man acting bona fide, to be necessary? Another interpretation of the phrase "reasonably necessary" is that suggested by Bramwell B. in *Kirk* v. *Gregory* (1); but that does not seem to be a meaning which either side seeks to attribute to it. The question therefore which we have to decide is whether a defendant relying on necessity as a justification of a trespass to land or to goods, and possibly also of a trespass to the person, can justify by anything short of actual necessity. The authorities appear to be all one way. The language used in *Malevérer* v. *Spinke* (2) points clearly to actual necessity being the test. *Mouse's Case* (3) is to the same effect; and still more explicit are the pleas in *Dewey* v. *White*. (4) The language of Kennedy J. in *Carter* v. *Thomas* (5) points to the same conclusion. Mr. St. Gerrans contended that "necessary" must mean what a reasonable man would in the circumstances think necessary; but, as pointed out by Hamilton J. during the argument, much of the law of trespass is archaic, while the conduct of the reasonable man as the standard of legal obligation is of modern origin; it is not therefore to be expected that in early decisions on the law of trespass the reasonableness of the defendant's conduct should be considered as an element in his justification. And there is good sense in this, because it is desirable that persons should not intermeddle with the property of others without a sense of responsibility, and that, if they fail to justify their interference, they should have to answer for it in a civil Court. I would refer again to *Kirk* v. *Gregory* (1), which is an important case not merely for the construction put by Bramwell B. on the phrase "reasonably necessary," but also for what was actually decided. Of the cases cited it is the most in favour of the defendant. There the act of interference was not, as here it was, done in adversum; it was done to protect the property of an undiscovered owner. In such circumstances the Court held that the defendant

(1) 1 Ex. D. 55.
(2) Dyer, 35b.
(3) 12 Rep. 63.
(4) Moo. & M. 56.
(5) [1893] 1 Q. B. 673.

might justify the interference by proving that the owner of the goods was recently dead, that the executor was unknown, that no one was in charge of the house, that the defendants were near relations of the deceased who had visited him, and that the trespass in question was a necessary removal of the goods for their preservation and protection, and a reasonable step. That is to say, the plea must shew that the property was in a position to require the defendant's interference and that the interference was reasonably carried out. But the reasonableness of the class of interference is not the question in this case. The difficulty in the defendant's way arises at an earlier stage, namely, whether interference was necessary at all. The meaning of the verdict is that the defendant reasonably thought that interference was necessary but that in fact it was not so; and therefore he stands defenceless in an action of trespass.

I have referred above to the question of trespass to the person. The common law justifies the detention of a furious lunatic, but it would be ridiculous to suggest that if one man thought, and reasonably thought, that another was a furious lunatic, he would be justified in detaining him if in fact he was sane. In Brooke's Abridgment, Faux Imprisonment, pl. 28, there is a summary of a case reported in the Year Book Hil. 22 Edward IV., f. 45, pl. 9 and 10. There the plaintiff brought an action of false imprisonment against the defendant, the servant of one J. Fortesque, Esq., who had a commission from the King to seize the plaintiff on the ground that he was a Scot and an enemy to the King. The same plaintiff brought another action against the same defendant for the imprisonment of his wife. The defendant pleaded that he met the woman on the high road and told her that her husband had been imprisoned as a Scot, whereupon her behaviour was such that it seemed that she was mad like one who is lunatic, and that the defendant, to avoid the mischief that might ensue, took her and imprisoned her in his house for the space of one hour. Fairfax J. said: "That is no plea, for you would have the jury try whether you thought, or whether it seemed to you, that she was mad as a lunatic, and that cannot be; you ought to have alleged that she was in fact mad and that she would have killed herself or done other mischief, as to set fire to a house;

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for I take it if you see two men fighting so that one may perchance kill the other it is lawful for you to separate them and imprison one of them in your house until his rage has abated; but although you should see two men quarrelling having high words as if they would fight, nevertheless it is not lawful for you to take one or the other and imprison him in any place, for notwithstanding those words perchance neither intends to strike the other; and therefore you shall understand that you should allege that she was mad in fact and that you were in dread that she would do you some mischief, wherefore you took her and imprisoned her in your house"—which he did, and issue was joined on that plea. In that case it was the fact and not the appearance that was necessary to justify the defendant; and so in the present case actual and not merely apparent necessity for interference must be shewn. The appeal must be allowed and judgment entered for the plaintiff for nominal damages, and the defendant must be restrained from further acts of interference.

HAMILTON J. I am of the same opinion. In my view the finding of the jury that the method adopted by the defendant was not in fact necessary is conclusive of the case. We are bound by the decision in *Cope* v. *Sharpe* (1), which is in full accordance with the current of earlier authority. This is not a case of a volunteer taking steps for the protection of the property of an owner who is not present and not represented. It is a case of two persons having different rights in the same land, both represented and both taking steps for the protection of their respective rights. The defendant justifies his invasion of the plaintiff's rights as the act of a servant in the protection and furtherance of his master's rights and interests. There is no authority for holding that anything short of actual necessity will justify such an intermeddling with the property of another, and the jury have found that there was no necessity for the defendant's act. Excellence of motive and devotion to the interests of his master may excuse the conduct of a servant if called in question by his master; but it is no answer when a third person complains of him

(1) [1910] 1 K. B. 168.

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for invading his property. If the second finding of the jury is susceptible of a meaning consistent with the first we ought to give it that meaning. If it means that although there was no necessity in fact yet the defendant honestly and not without reason thought that there was, that may exculpate him from the charge of a breach of duty to his master, but it is not enough to justify him or his master in his action towards the plaintiff. If on the other hand it is supposed to raise the contention that where intervention is necessary the choice of means must be reasonable, the contention thus raised is irrelevant, because by the finding of the jury the intervention of the defendant was not necessary. The appeal must therefore be allowed, and as the defendant claimed the right to interfere in this way as often as occasion should arise, there must be judgment for the plaintiff for five shillings and an injunction restraining the defendant from further trespassing upon the plaintiff's property.

SCRUTTON J. I agree.

*Appeal allowed.*

Solicitors for appellant: *Johnson, Weatherell & Sturt, for Lamb, Brookes & Co., Odiham.*

Solicitors for respondent: *Walker & Rowe, for Edwyn T. Close, Camberley.*

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*April 27.*

## NEWQUAY URBAN DISTRICT COUNCIL *v.* RICKEARD AND ANOTHER.

*Local Government—Street—Private Street Works—Provisional Apportionment—"Access through court, passage, or otherwise"—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *s.* 10.

By s. 10 of the Private Street Works Act, 1892, an urban authority about to execute private street works in any street may include in a provisional apportionment of the expenses of the works "any premises . . . . access to which is obtained from the street through a court, passage, or otherwise," and which will in their opinion be benefited by the works:—

*Held*, that there may be included premises access to which is obtained through a private road made primarily for the purpose of giving access thereto, but not premises access to which is obtained through a road which is or is intended for a public street.

Case stated by justices of the peace for the county of Cornwall.

Application was made to a Court of summary jurisdiction by the appellants under s. 8 of the Private Street Works Act, 1892, to determine the matter of certain objections made under s. 7 of the same Act by the respondents to a provisional apportionment of expenses made by the appellants under s. 10 of the Act (1) in respect of certain works proposed to be executed in certain streets within the appellants' district called Springfield Roads,

(1) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 10: "In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises; but the urban authority may, if they think just, resolve that in settling the apportionment regard shall be had to the following considerations; (that is to say,)

"(*a*) The greater or less degree of benefit to be derived by any premises from such works;

"(*b*) The amount and value of any work already done by the owners or occupiers of any such premises.

"They may also, if they think just, include any premises which do not front, adjoin, or abut on the street or part of a street, but access to which is obtained from the street through a court, passage, or otherwise, and which in their opinion will be benefited by the works, and may fix the sum or proportion to be charged against any such premises accordingly."

entrance roads from Berry Road on the west side thereof, and the entrance road from the main street leading to and including Oakleigh Terrace Road, which apportioned a portion of those expenses on the respondents.

The facts proved or admitted at the said hearing before the justices were as follows:—

1. The appellants are an urban authority who have duly adopted the Private Street Works Act, 1892, and within whose district are certain streets known as Springfield Roads and entrance roads from Berry Road on the west side thereof and the entrance road from the main street leading to and including Oakleigh Terrace Road.

2. The respondent Silas Rickeard is the owner of certain building lands access to which is obtained from the said streets through two partly made roads (marked "S. R." on a plan which was attached to the case) belonging to the said Silas Rickeard; but he has other means of access to his said lands.

3. The respondent George Hawke is the owner of certain building lands access to which is obtained from the said streets through an unmade road belonging to the said George Hawke (marked "G. H." on a plan attached to the case); but he has other means of access to his said lands.

4. At a meeting held on June 7, 1910, the appellants duly resolved to do private street works in the Springfield Roads and other streets before mentioned, and resolved that the expenses of carrying out the above-mentioned works should be apportioned otherwise than according to the respective frontages of the premises fronting, adjoining, or abutting on the aforesaid roads, and that regard should be had to (1.) the greater or less degree of benefit to be derived by any premises from any such works, and (2.) the amount or value of any work done by the owners or occupiers of any such premises. They also resolved to include in the apportionment any lands or premises access to which was obtained from the said streets through a court, passage, or otherwise and which would be benefited by the works. At the same meeting the appellants approved the plans and sections, specifications and estimates, and provisional apportionments, which had been prepared by the surveyor.

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5. On July 2, 1910, a copy of the resolution approving the specifications, plans and sections, estimates, and provisional apportionment was duly published and copies thereof were duly served upon the owners of the premises shewn as liable to be charged in the provisional apportionment, and, amongst others, upon the respondents as owners of certain premises access to which was alleged by the appellants to be obtained from the said streets through a court, passage, or otherwise within the meaning of s. 10 of the said Act of 1892.

6. On July 25, 1910, the respondent Silas Rickeard, who had received a notice of his alleged liability in respect of the apportionment, served on the appellants a notice of which, omitting formal parts, the following is a copy:—

"I beg to give you notice that I object to the assessments served on me with regard to the making up of certain streets. I am not a frontager and have no interest in the making up of the streets referred to in the notice served on me, and I shall resist any claim made on me in respect of the cost of making up the said streets."

On July 25, 1910, the respondent George Hawke, who had received two notices of apportionment in accordance with s. 7 of the Act, served on the appellants two notices of objection. Omitting formal parts, the following is a copy of one of the two notices served by the respondent George Hawke:—

"Referring to the notice served on me by the above council dated July 2, 1910, I hereby give you notice that I object to the charge on my land of 10*l.* in respect of the works proposed to be carried out in the streets named in the said notice on the ground that such charge is excessive having regard to the degree of benefit to be derived by me in respect of such streets."

The other notice was identical except as to the amount, which was therein stated to be 7*l.* 13*s.* 9*d.* instead of 10*l.*

7. In pursuance of the resolutions the appellants in making the provisional apportionments had in some cases made no apportionment against the owners of premises fronting, adjoining, or abutting on the streets, and in other cases had made no apportionment according to the frontage, but had charged for

the amount of benefit which they considered would be derived by the premises in respect of the works.

8. On receipt of the notices the appellants applied to the Court of summary jurisdiction to appoint a time for determining the matter of these objections, and on October 28, 1910, duly served notices on the respondents of the date of the hearing.

9. At the hearing it was contended on behalf of the appellants that the means of access to the premises of both the respondents were through a court, passage, or otherwise within the meaning of s. 10 of the Act.

10. It was contended on behalf of the respondents that the means of access to their premises respectively from the streets were not through a court, passage, or otherwise within the meaning of s. 10 of the Act.

11. The justices decided that the premises of the respondents had not a means of access from the said streets through a court, passage, or otherwise within the meaning of s. 10 of the Act. They accordingly ordered the provisional apportionment to be amended by striking out the apportionments made in respect of the premises belonging to the respondents respectively.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

*Bodkin*, for the appellants. It is common ground that access is obtained to the premises of the respondents from the streets in which the works are to be executed; in the one case by the two partly made roads marked "S. R." and in the other case by the unmade road marked "G. H." The only question in the case is whether this is access "through a court, passage, or otherwise." The justices appear to have thought that these partly made and unmade roads were too wide to admit of access through them being included in the phrase "access through a court, passage, or otherwise." By a misapplication of the doctrine of ejusdem generis they have decided that the means of access must be narrow as it would be through a passage. But that leaves "court" entirely out of account. There is no reason to suppose that the width of the means of access is in any way a test of

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whether the access is "through a court, passage, or otherwise" within the meaning of the enactment.

*J. A. Hawke*, for the respondents. There must be some limit to the access which the Legislature has described as "through a court, passage, or otherwise." If not, those words might be omitted altogether. Access through a court, passage, or otherwise does not include access through a public street. Neither would it include access through a partly made road or an unmade road, if either was laid out and designed to become a public street.

The access to come within s. 10 must be through a court or passage or some other means giving access as a court or passage does; for example a bridge or gangway, or a flight of steps. If access through a public street were intended there would be nothing to prevent the local authority from including in an apportionment houses in a large city at the furthest possible distance from the street in which the works are being done, and there would be no reason for imposing any qualification on the premises which may be included in an apportionment beyond that of benefit derived by them from the private street works. Within the two limits of access through a public street and access through a passage the question whether there is access within the meaning of s. 10 is a question of fact, which in this case the justices have determined in favour of the respondents.

*Bodkin* in reply.

LORD ALVERSTONE C.J. This case must go back to the justices. It is not clear what the justices meant when they decided, as stated in paragraph 11 of the case, "that the premises of the respondents had not a means of access from the said streets through a court, passage, or otherwise within the meaning of s. 10 of the Act." That section enlarged the area of land which could be laid under contribution towards the expense of public improvements. Before that enactment there was no power to include in an apportionment any land which did not front, adjoin, or abut upon the street in which the works were being executed. Sect. 10 conferred additional powers upon the urban authority. After

first directing them to make the apportionment upon owners according to the frontage of their respective premises, it provides that the urban authority may resolve that in settling the apportionment regard shall be had to the greater or less degree of benefit to be derived by any premises from such works, and the amount and value of any work already done by the owners and occupiers of any such premises. That section therefore gave the authority power to settle the apportionment otherwise than by the mere consideration of the frontage of the premises and enabled them to compare the degrees of benefit which the various premises derived. The section then proceeds to confer upon the local authority a fresh power of adjusting the burden which theretofore fell upon frontagers exclusively. It proceeds to enact that they may also, if they think just, include any premises which do not front, adjoin, or abut on the new street "but access to which is obtained from the street through a court, passage, or otherwise," and which in their opinion will be benefited by the works, and they may fix the sum or proportion to be charged against such premises accordingly. The doctrine whereby in construing statutes or other instruments the words "other" and "otherwise" are limited to things or means not before mentioned but being ejusdem generis with those already mentioned in the instrument is well known; it has been invoked in the present case to shew that in the phrase "access . . . . through a court, passage, or otherwise" the access other than through a court or passage must be of a width not greater than that of a court or passage. To hold that would be to shut one's eyes to the real intention of the Legislature, which was to enable the local authority to include property which gets access to the street in which the works are being executed, and I decline to hold that premises which have such access are not to be included in an apportionment because the means of access may be of a width greater than that which is usual for a court or passage, or that they are only to be included when the access is by means of a court or passage or something of that character. A court does not usually convey any idea of narrowness, and therefore "court or passage" gives no measure whereby to limit the narrowness

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Lord Alverstone C.J.

of the means of access embraced in the words "or otherwise." The governing test is access to the street by some means other than actual fronting, adjoining, or abutting. On the other hand I do not hold that the urban authority ought to include in an apportionment premises whose means of access to the street is by a public street. The real question in the present case is as to the nature of the roads indicated by the letters "S. R." and "G. H." and described in the special case as partly made and unmade roads respectively. The justices ought to consider whether these are mere roads for the purpose of giving access to premises from the streets in which the works are to be executed, or whether they are themselves public streets in process of development. If they are not merely for the purpose of giving access to the houses, but are roads about to become public streets, it would not be right to say that there is access through them or either of them to the premises in question from the streets in which the works are to be executed. There would be access from the roads to the premises or from the roads to the streets, but not from the streets to the premises within the meaning of this enactment. If access is obtained from the streets to the premises, then the latter may be included in an apportionment, but if the access from the streets to the premises is through another public street, then in my view access is not obtained to the premises from the streets within the meaning of s. 10 of the Act of 1892. A large house may have access to a street by a wide carriageway through land let to tenants; such a house could be included in an apportionment. But if between the house and the street the communication were by another public street either made or in the making, the house in that case would not be within the provision of s. 10. Therefore the question for the justices is whether these partly made or unmade roads are merely to give access to the houses or are themselves in process of becoming streets. In the latter case the decision under appeal will stand; in the former it must be reversed.

PICKFORD J. I am of the same opinion. It is difficult to say on what grounds the justices decided the case. If they decided on the mere question of the width of the means of access they

decided on wrong grounds. "Access by court, passage, or otherwise" does not necessarily mean access by a court, passage, or other means of access which is narrow because a passage is narrow; it means access by something which gives access to the street in the same way as a court or passage gives access to the street. I agree that access from a street to premises by means of another public street is not access within the meaning of s. 10. If it were, there would be practically no end to the premises to which access may be obtained. By such means as that access may be had from the Strand to the Chelsea Embankment. The effect of the words must be restricted by excluding cases of that description. In the present case we do not know what view the justices took of these partly made or unmade roads, whether they regarded them as intended primarily as a means of access from the premises to the streets in the way in which a court or passage gives access, or whether as made alio intuitu with a view of themselves becoming public streets and made primarily for the use of houses to be hereafter built along them, and only incidentally giving communication between the premises in question and the streets the subject of the works. In the first alternative I think the case would be within the section, in the second it would not. These, and not merely the width of the roads, are the matters which the justices must consider.

LUSH J. I agree.

*Appeal allowed. Case remitted to the justices.*

Solicitors for appellants: *Rodyk, Williamson & Co., for G. Fraser Nicholls, Newquay.*

Solicitors for respondents: *Gibbs, White & Strong, for Greenway & Sons, Newquay.*

W. H. G.

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*April* 11, 12; *May* 30.

## CONSERVATORS OF MITCHAM COMMON *v.* COX. SAME *v.* COLE.

*By-law — Validity — Preference — Consideration — Metropolitan Common — Scheme—Regulation of Games—Golf Course—Metropolitan Commons Act,* 1866 (29 *&* 30 *Vict. c.* 122)—*Metropolitan Commons (Mitcham) Supplemental Act,* 1891 (54 *Vict. c. xxvi.*).

By a scheme made under the Metropolitan Commons Acts, 1866 and 1869, and confirmed by the Metropolitan Commons (Mitcham) Supplemental Act, 1891, conservators were directed to set apart such portions of a common as they should consider expedient for games and to form grounds for cricket and other games, and to frame by-laws and regulations for (among other purposes) the regulation of games to be played and other means of recreation on the common and generally for the prevention of any act tending to interfere with the use thereof by the public for the purposes of exercise and recreation. No by-laws were to have effect unless and until confirmed by the Local Government Board. The scheme saved to the lords of certain manors their rights in the soil of the commons, but the conservators were empowered upon payment of compensation to restrict, diminish, or extinguish those rights if they should interfere with the control, preservation, or improvement of the common.

With the consent of the conservators a golf club was formed which acquired the rights of the lords of the manors and laid out and maintained on the common two golf courses, the Prince's golf course and the Prince's ladies' golf course. The golf club conveyed to the conservators all their rights over the soil of the common, in return for which the conservators by deed granted to the golf club a licence to play golf upon both the golf courses. By this deed the conservators covenanted that they would not make any such by-laws or regulations as would unreasonably interfere with the club playing golf on the courses and would not permit persons other than those authorized by the club or residents in the parish of Mitcham to play golf or any other game on the courses.

In pursuance of the scheme the conservators made a by-law that no person should play cricket or any other game upon the parts of the common set apart or appropriated for cricket, football, golf, &c., except at such times and under such regulations as the conservators should prescribe, and that no person should obstruct or interfere with or annoy any persons playing at cricket or any other lawful game. They also made the following regulations:—(1.) That golf should not be played upon any part of the common except the Prince's golf course and the Prince's ladies' golf course; (2.) that for the safety of the public and the preservation of the turf, no one should play golf on either of the said courses unless accompanied by a caddie duly authorized and licensed by the conservators or the golf club; (5.) that

no one who was not a member of the golf club should play on the Prince's golf course on Saturdays, but that persons holding permits might play on the Prince's ladies' golf course on Saturdays, but must be accompanied by caddies; (7.) that no person should play golf on either of the courses unless he or she were a member of the golf club or an inhabitant of Mitcham holding a permit from the conservators. The by-law was confirmed by the Local Government Board, but the regulations were not submitted for confirmation:—

*Held*, per curiam (Phillimore, Hamilton, and Scrutton JJ.), that regulation 2 was valid.

*Per* Phillimore and Hamilton JJ., that regulation 7 was unequal and void in excluding all but inhabitants of Mitcham and members of the golf club from playing golf on the courses.

*Per* Phillimore and Hamilton JJ. (Scrutton J. dissenting), that regulation 7 and *semble* regulation 5 also were ultra vires and void in giving a permanent preference to the members of the golf club; that the conveyance of their rights in the soil was not a good consideration for such a preference; and that, whether or not the making and maintaining of the golf courses were a good consideration, the preference was not authorized by the by-law and could not be given by mere regulation.

CASES stated by the justices of the peace for the county of Surrey.

The Board of Agriculture, acting under the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), and the Metropolitan Commons Amendment Act, 1869 (32 & 33 Vict. c. 107), duly certified a scheme for the local management of Mitcham Common, Upper Green, Lower Green, Figgs Marsh, and Beddington Corner, therein called collectively the commons. This scheme was duly confirmed by the Metropolitan Commons (Mitcham) Supplemental Act, 1891 (54 & 55 Vict. c. xxvi.).

By s. 1 of the scheme the commons were thenceforward to be regulated and managed by a body of conservators. After providing for the constitution, meetings, proceedings, and for the appointment of the conservators and their officers and servants, the scheme proceeded to confer and impose upon the conservators the following powers and duties:—

Sect. 16. "The conservators may execute any works of drainage, raising, levelling, or fencing for the protection and improvement of the commons so far only as may be required for the purposes of the Metropolitan Commons Act, 1866, and the Metropolitan Commons Amendment Act, 1869, and may

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do any work necessary for the proper cleansing of the ponds on the commons, and shall preserve the turf, shrubs, trees, plants, and grass thereon, and for this purpose may enclose by fences for short periods such portions as may require rest to revive the same, and may plant trees and shrubs for shelter or ornament, but shall do nothing that may otherwise vary or alter the natural features or aspect of the commons, or interfere with free access to every part thereof."

Sect. 18. "The conservators shall set apart such portion or portions of the commons as they may consider expedient for games, and may form any ground or grounds for cricket or other games, and may allow the same to be temporarily enclosed with posts and chains or other open fence, so as to prevent cattle and horses straying thereon."

Sect. 19. "The conservators shall frame by-laws and regulations for the prevention of nuisances and the preservation of order upon the commons. The by-laws may include all or any of the following purposes, viz.:—

. . . . .

"The regulation of games to be played and other means of recreation on the commons, and of assemblages of persons thereon.

. . . . .

"Regulations with the view of preserving or restoring the natural surface of the ground, and as to place and mode of digging and taking gravel, sand, or other substances from and of cutting and felling of trees and underwood growing upon the commons, in exercise of any right of common or other right over or upon the commons.

"The prevention of unauthorized persons from turning out or knowingly permitting cattle, sheep, or other animals to graze or feed, or remain upon the commons, and generally for the prevention or restraint of any act or thing tending to the injury or disfigurement of the commons, or to interfere with the use thereof by the public for the purposes of exercise and recreation.

"Provided that all by-laws made by the conservators shall be in writing under their seal, and the conservators may by such

by-laws impose upon offenders against the same such reasonable penalties, to be recovered on summary conviction, as they shall think fit not exceeding the sum of 5*l.* for each offence . . . . Provided always, that no by-laws shall be repugnant to the laws of England or the provisions of this scheme, and no by-laws or any alteration or repeal of any by-laws shall be of any force or effect unless and until the same be confirmed by the Local Government Board . . . ."

Sect. 22. "All by-laws made by the conservators in pursuance of the scheme, shall be printed, and shall be sold to any person who may apply for the same at such price not exceeding one shilling per copy as the conservators may determine, and all by-laws shall be legibly written or printed at length on boards of suitable size and placed on such parts of the commons (not less than three) as to the conservators may appear desirable."

Sect. 32. " Proceedings with a view to the summary conviction of offenders under this scheme, or under any by-laws of the conservators . . . . shall be taken before a Court of summary jurisdiction according to the provisions of the Summary Jurisdiction Acts . . . ."

Sect. 37. " Saving always to all persons and bodies politic and corporate, and their respective heirs, successors, executors, and administrators, all such estates, interests, or rights of a profitable or beneficial nature in, over, or affecting the commons or any part thereof as they or any of them had before the confirmation of this scheme by Act of Parliament, or could or might have enjoyed if this scheme had not been confirmed by Act of Parliament."

Sect. 38. " The lords of the manors of Biggin and Tamworth, Ravensbury, Mitcham, and Vauxhall, or of some one or more of such manors, claim the soil and freehold of the commons and the minerals thereunder . . . ."

Sect. 40. " This scheme affects the rights in and over the commons so claimed as aforesaid only so far as is absolutely necessary for the purposes of this scheme, that is to say, by conferring on the conservators powers of management, improvement, and control as hereinbefore provided, and for such purposes the power of restricting, diminishing, or extinguishing such

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rights or any of them, whenever it shall appear to the conservators that the continuance of such rights will interfere with the control, preservation, or improvement of the commons by the conservators, or with any of the purposes of this scheme, upon payment by the conservators of compensation to the bodies or persons severally interested in such rights. The amount, if any, to be paid by the conservators to such bodies or persons, as and for compensation in respect of the restriction, diminution, or extinction of such rights shall be settled by agreement, or failing agreement, then under the provisions of the Lands Clauses Consolidation Act, 1845, and the Acts amending the same, so far as the same relate to the purchase and taking of lands otherwise than by agreement, including therein the several provisions relating to the compensation for common or waste lands, and thereupon the several provisions of such portion of the Lands Clauses Consolidation Act, 1845, and the Acts amending the same, shall apply as if in all cases the word 'lands' included interests, rights, and easements."

Sect. 41. "Provided always, that before the conservators take any proceedings under the provisions of the Lands Clauses Consolidation Act, 1845, and the Acts amending the same, with respect to any estate, interest, or right of a profitable or beneficial nature, in, over, or affecting the commons, or any part thereof, they shall, if required, give security to the owner or owners of such estate, interest, or right to the satisfaction of the Board of Agriculture for the costs to which he or they would be entitled under the same Acts."

Sect. 42. "The lords of the aforesaid manors have not consented to their rights being affected in the manner and to the extent herein expressed, but having regard to clauses 37, 38, 40, and 41, they do not oppose the scheme . . . ."

The Metropolitan Commons (Mitcham) Supplemental Act, 1891, received the Royal assent on May 11, 1891. On June 6, 1891, at the first meeting of the conservators, a letter was read from one Robert Hippisley Cox offering to make a golf course upon certain conditions. On July 11 the conservators authorized the course upon certain conditions. Upon the faith of this authority R. H. Cox formed the Prince's Golf Club,

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and he or the club spent considerable sums in making the golf course. Before the scheme came into force golf had never been played on the commons.

In or before the year 1892 the Prince's Golf Club Company Limited, acquired the rights (if any) of R. H. Cox in the golf course. By a deed dated March 27, 1893, the manor of Ravensbury was conveyed to the Prince's Golf Club Company; and by a deed dated March 29, 1893, the manor of Biggin and Tamworth was conveyed to R. H. Cox as trustee for the same company to the extent therein mentioned.

Disputes having arisen between the conservators and the Prince's Golf Club, an arrangement was come to in pursuance of which, by a deed dated July 5, 1894, and made between the Prince's Golf Club Company of the first part, the conservators of the second part, and certain trustees of the third part, the company conveyed to the trustees for and on behalf of the conservators all their estate, right, title, and interest in, to, upon and over the soil of the commons, and all their manorial, commonable, and other rights upon the whole of the commons; and by an agreement and licence under seal of the same date, made between the conservators of the one part and the Prince's Golf Club Company of the other part, a licence was granted for the period of twenty-one years from July 1, 1893, to the company and the Prince's Golf Club to play golf on the respective golf courses or links laid out for playing golf on the commons on payment of the annual rent and on other terms therein mentioned.

By a deed dated April 10, 1897, and made between the conservators of the one part and certain trustees of the other part, in consideration of the drainage and laying out of new golf links the conservators granted a licence to the trustees for and on behalf of the proprietors of the Prince's Ladies' Golf Club to play golf from the date thereof until July 1, 1914, at the annual rent therein mentioned.

By a deed dated July 20, 1901, and made between the conservators of the one part and the Prince's Golf Club Company of the other part, all the before-mentioned licences were determined and a new licence was granted by the

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conservators to the company, comprising all the courses or links, from December 31, 1900, for a term of thirty years. The material clauses in this deed are the following:—

3. "For the period of thirty years from December 31, 1900, or until this licence shall be revoked and determined as hereinafter provided the company and the Ladies' Golf Club respectively shall be entitled to play the game of golf on the respective golf courses or links now laid out for playing golf on the commons as well for men as for ladies in manner hereinafter mentioned."

7. "The company shall so long as this licence shall be unrevoked and undetermined pay to the conservators the annual sum of 250*l.* payable by equal quarterly payments on January 1, April 1, July 1, and October 1 in each year. The first of such payments having been made on April 1, 1901, the next thereof shall be made on October 1, 1901."

8. "If the company shall wilfully commit breaches of the by-laws of the conservators, or if and whenever any rent shall be in arrear for the space of twenty-one days after the date fixed for payment thereof, or if there shall be any breach by the company of any of the covenants and agreements on its part herein contained, the conservators may revoke and determine their licence."

10. "Prior to this licence being revoked and determined under the preceding clause hereof the conservators shall pay to the company the sum of 2500*l.* by way of compensation."

11. "The company covenants that the members of the club and all persons introduced by them shall play golf in a reasonable way and so as not to interfere with the exercise of rights of pasturage and other common rights, and no such members or any such other person as aforesaid shall play golf on the commons on Sundays, and further that such company, members, and persons as aforesaid shall observe all the by-laws of the conservators."

12. "The conservators shall not during the continuance of this licence make any such by-laws or regulations as will unreasonably interfere with the company playing golf on the said courses, provided always that nothing herein contained shall be construed to affect the power of the conservators to

prohibit altogether the playing of golf on the commons on Sundays."

17. "So long as this licence shall remain in force the conservators will not knowingly permit any person or persons other than those authorized by the company or residents in the parish of Mitcham to play golf or any other game on the said courses or links, but in like manner the conservators shall not be bound to institute any proceedings against any such person as aforesaid, except on receiving such indemnification against all costs, charges, and expenses from the company" as therein mentioned.

Under section 19 of the scheme the conservators made by-laws and regulations of which the following are material to the present case:—

By-law 14. "The conservators being empowered from time to time to set apart or appropriate any part or parts of the common for the protection of the turf, trees, or shrubs thereon, or for walking or for cricket, football, golf, skating, sliding, or other reasonable recreation, no unauthorized person shall drive, ride, or pass over with any vehicle, or upon horseback, the parts of the said common so set apart or appropriated, and no person shall play cricket or any other game, or skate or slide, upon the parts so set apart or appropriated, except at such times and under such regulations as the conservators may from time to time prescribe, and no person shall obstruct or interfere with or annoy any persons who are playing or have made preparations for playing at cricket or any other lawful game, or who are skating and sliding upon the parts so set apart or appropriated."

The regulations made by the conservators which are material are those numbered 1, 2, 5, 7, and 8, and are in the following terms:—

1. "Golf shall not be played upon any part of the commons except upon the two golf courses laid out by the Prince's Golf Club, and known as 'Prince's golf course' and the 'Prince's ladies' golf course.'"

2. "For the safety of the public and the preservation of the turf, no one shall play golf on either of the said courses unless accompanied by a caddie duly authorized and licensed by the

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conservators or Prince's Golf Club. The caddie shall be entitled to charge for his services 1*s.* per round for the carrying of the clubs."

5. "No one who is not a member of Prince's Golf Club will be allowed to play on the Prince's golf course on Saturdays, but persons holding permits may play on the Prince's ladies' golf course on Saturdays but must be accompanied by caddies."

7. "No person shall play golf on either of the said golf courses unless he or she is a member of Prince's Golf Club or Prince's Ladies' Golf Club, or an inhabitant of Mitcham holding a permit from the conservators signed by the clerk to the conservators."

8. "Application for permits must be made to the clerk, in writing, and will be considered at the next meeting of the board of conservators held not less than fourteen days after receipt of such application. Permits will only be granted to individuals, and cannot be granted to clubs, and will be granted subject to the due observance of the before-mentioned rules and regulations and to the observance of all the by-laws of the conservators."

An information was preferred by the conservators by Peter Lawton, keeper of the common, on their behalf, against the respondent W. E. Cox, of Fair Green, Mitcham, charging that on Saturday, March 26, 1910, he did play golf upon the Prince's golf course, being a part of the common set apart or appropriated for playing golf, without a caddie, and, not being a member of the Prince's Golf Club, did play on the Prince's golf course on a Saturday contrary to by-law 14 made by the conservators of the common under the Metropolitan Commons (Mitcham) Supplemental Act, 1891 (54 Vict. c. xxvi.), and the regulations made under the by-law.

Another information was preferred against the respondent George Cole, of London Road, Lower Mitcham, charging that on Friday, March 25, 1910, he did play golf on the same course without a caddie and, not being a member of the Prince's Golf Club, without a permit from the conservators, contrary to the same by-law.

On the hearing before the justices the following facts were admitted or proved:—

Neither of the respondents was a member of Prince's Golf

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Club. Both were inhabitants of Mitcham. The respondent Cox played golf on Prince's golf course on Saturday, March 26, 1910, in contravention of regulation No. 5; he had a permit but no caddie as required by regulation No. 2.

The respondent Cole played golf on Prince's golf course on Friday, March 25, 1910; he had no caddie and had obtained no permit as required by regulations numbered 2 and 7.

Both the respondents had frequently before March 25, 1910, played golf on the said course, and particularly in September and October, 1909, before the regulations were adopted and issued by the conservators.

The keeper of the common had instructions from the conservators to take the names and addresses of every person not a member of the Prince's Golf Club who played golf on the Prince's golf course, and had in fact taken the names of between sixty and seventy persons, including the respondents, who had so played.

The Prince's Golf Club is an exclusive club. No caddies have been in fact licensed by the conservators; all caddies hitherto licensed have been so licensed by the Prince's Golf Club.

By-law 14 was published and the regulations were referred to on notice boards on the common.

The regulations for playing golf contained in the minute-book of the conservators had not been submitted to the Local Government Board for confirmation or approval.

A certain bridge connecting two portions of the ladies' golf course is the private property of the Ladies' Golf Club, and there is a considerable distance from the twelfth green to the thirteenth tee.

If a player requires a caddie he is bound to go to the Prince's Golf Club for the purpose.

No evidence was produced, except the deed of July 20, 1901, that the conservators required members of the Prince's Golf Club to obtain permits for playing on the spaces set apart as the Prince's golf course, but the solicitor for the conservators in the course of the hearing admitted that "they did not make the regulations 5 and 7 applicable to the members of the Prince's Golf Club because there was already a regulation as to their

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play." No evidence, other than the said deed, of such other regulation was produced.

No evidence was produced that persons other than the inhabitants of Mitcham were under the obligation to obtain permits or caddies as a condition precedent to their playing golf on the places set apart for the purpose.

Upon the above evidence and admissions the appellants contended that by-law 14 gave them power to make the regulations put in evidence; that the regulations were not by-laws nor part of the by-laws, and did not therefore require confirmation by the Local Government Board; that the appellants have power under by-law 14 to compel all players to employ caddies and fix their fee or remuneration as incidental to or consequential upon the power conferred by that by-law to make regulations, and it was within the scope of the by-law that a fee should be fixed by the conservators without express power to do so; also that it is incidental to or consequential upon the same power that they should require inhabitants of Mitcham desiring to play golf on the Prince's golf course or Prince's ladies' golf course to first obtain a permit as set forth in regulations numbered 7 and 8. The decision of the Court in *De Morgan* v. *Metropolitan Board of Works* (1) was cited as an authority in support of these contentions.

The respondents contended—

(*a*) That the regulations were in themselves by-laws requiring confirmation by the Local Government Board.

(*b*) That the regulations were ultra vires on the ground that they were unequal in their operation as between different classes and were repugnant to the scheme sanctioned by and contained in the Act of 1891.

(*c*) That if the regulations were not by-laws then there was no power to inflict a penalty. It was further submitted that the by-laws say nothing as to permits.

The decisions of the Court in *Moorman* v. *Tordoff* (2) and *Kruse* v. *Johnson* (3) were cited in support of these contentions.

(1) (1880) 5 Q. B. D. 155. (2) (1908) 72 J. P. 142.
(3) [1898] 2 Q. B. 91.

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The justices held—

(1.) That the regulations did not require confirmation by the Local Government Board.

(2.) That the regulations ought on the authority of *Moorman* v. *Tordoff* (1) to be regarded as incorporated in the by-laws.

(3.) That whether considered as regulations or by-laws Nos. 2 and 5 were partial and unequal in their operation as between different classes of persons in requiring players other than members of the Prince's Golf Club to engage a licensed caddie (licences being in practice obtainable only from the same club, a body independent of the conservators), this being an unnecessary and unreasonable interference with the liberty of those subject to the by-laws.

(4.) That similarly regulations 7 and 8 were partial and unequal in requiring inhabitants of Mitcham who are not members of Prince's Golf Club to obtain permits as a condition precedent to their playing golf on land set apart for the purpose, no similar regulation having been proved to exist with regard to members of that club.

(5.) That there was no power to charge a fixed fee or remuneration for a caddie either expressly conferred by or incidental to or consequential upon by-law 14; that the charge might be arbitrarily increased contrary to the intentions of the scheme and was unreasonable.

(6.) That the prohibition against playing golf on Saturdays on the Prince's golf course except to members of the Prince's Golf Club was partial and unequal in its operation and favoured those who were members of that club who can play on Saturdays to the exclusion of those who are not members but who wish to play on that day of the week upon the Prince's golf course.

(7.) That the alternative given of using the ladies' golf course to those desiring to play on Saturdays is partial and unequal in its operation and unreasonable.

Upon these grounds and in view of the decisions of the Court in the cases of *Parker* v. *Bournemouth Corporation* (2) and *Moorman* v. *Tordoff* (1) the justices decided that

(1) 72 J. P. 142. (2) (1902) 86 L. T. 449.

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regulations 2, 5, 7, and 8 were ultra vires and unreasonable, and therefore dismissed the informations.

The questions of law for the opinion of the Court were:—

(1.) Whether the justices correctly decided that the regulations as such did not require confirmation by the Local Government Board.

(2.) Whether the regulations numbered 2, 5, 7, and 8 or any of them were ultra vires or unreasonable.

*Danckwerts*, *K.C.*, and *Colam*, for the appellants. The magistrates ought to have convicted in both cases. They have approached the consideration of by-law 14 and the regulations made under it from a mistaken standpoint. The conservators, a locally elected body, may be presumed to know what is for the advantage of the locality. By section 2 of the scheme they consist of one member appointed by the lords of the manors within which the commons lie, four members for Mitcham, four for Croydon, two for Beddington, and two for Wallington. The main ground on which the justices attack the by-law and regulations is that, they prefer the members of the golf club to the prejudice of other members of the public. But a body elected as these conservators were are not likely to do that without some reason. The attitude of mind in which the justices ought to have approached the by-law and regulations is that laid down by Lord Russell C.J. in *Kruse* v. *Johnson* (1): a by-law made by a public representative body ought to be supported unless it is manifestly partial and unequal in its operation between different classes, or unjust, or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it.

As to the specific regulations, both respondents broke regulation 2; that regulation provides that no one shall play golf without a caddie, who may charge one shilling per round for his services. There is nothing partial or unequal in that; neither is it unjust, nor made in bad faith, nor does it involve any unjustifiable interference with the liberty of those subject to it. If all the public might play golf on Mitcham Common without caddies, the common would be a place of public danger instead of public

(1) [1898] 2 Q. B. 91.

recreation. The charge of one shilling per round is a reasonable and very usual charge. This is a perfectly reasonable and therefore valid regulation. Both respondents broke it, and therefore they ought to have been convicted, no matter whether the other regulations were valid or invalid; for if a by-law can be divided, one part may be rejected as bad, while the rest may be held to be good: *Strickland* v. *Hayes*. (1)

But the other regulations are good. Those numbered 5 and 7 are the ones impugned. No. 5 provides that no one who is not a member of the golf club may play on the men's course on Saturdays, and No. 7 that no one may play on either of the courses unless he is a member of the golf club or an inhabitant of Mitcham holding a permit. The objections to these are (1.) that they unduly prefer the golf club above all persons, and (2.) that they prefer the golf club and inhabitants of Mitcham above all other members of the public. Now it is not per se conclusive of the invalidity of a by-law that it confers a preference; the question to be answered in each case is whether the agreement whereby the preference is given is reasonable: *Parker* v. *Bournemouth Corporation*. (2) In the present case the best judges of that are the conservators, who took into consideration facts which the justices seem to have ignored, namely, that but for the golf club there never would have been any golf; for, first, as assignees of the lords of the manors, the club could have prevented the courses being laid out except on payment of compensation, and, secondly, the club laid out the course at great expense and maintain it at great expense. This expense, and the conveyance of their rights in the soil to the conservators, and the rent they pay for their licence to play golf, constitute ample consideration for some preference. But who is to decide on the adequacy of the consideration? The conservators are beyond doubt the best judges of that. They best know whether on the balance the neighbourhood gains or loses by the existence of the golf club and the preference granted to it.

Then as to the restrictions imposed and the exclusion of persons other than members of the golf club and inhabitants of Mitcham, it is plain that all the world cannot play golf on

(1) [1896] 1 Q. B. 290. (2) 86 L. T. 449

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Mitcham Common at their own free will. Some restriction must be imposed. Restriction by means of permit is a well-known method recognized by law: *De Morgan* v. *Metropolitan Board of Works* (1); *Nash* v. *Manning* (2); *Williams* v. *Weston-super-Mare Urban District Council.* (3) A section of the public may be excluded by this means from a limited space: *Gray* v. *Silvester.* (4) If the whole common had been dedicated as a public golf course there would be much to support the decision of the justices; but that is not the case. The regulations are amply warranted by section 19 of the scheme, which enabled the conservators to frame by-laws and regulations for the prevention of nuisances and the preservation of order upon the commons.

*Macmorran, K.C.*, and *J. A. Johnston*, for the respondents. The object and intention of the scheme is to dedicate the commons for the purposes of exercise and recreation to and for the use of the public. Any attempt by the conservators to use or apply their powers to any other purpose is ultra vires and of no effect. No bargain or promise so to use or apply them can stand, no matter on what consideration it be based. Therefore the attempt to prefer the golf club in consideration of the conveyance of rights in the soil which they formerly owned, or of their having made and maintained the golf courses, or of the rent which they pay, or for any other consideration, must fail. It follows that regulation 5 in so far as it excludes from the men's course on Saturdays all who are not members of the golf club is void. The special case shews that the ladies' course, to which on Saturdays all the rest of the public is relegated, is a very inferior course. Further, to exclude the respondents and other persons in their position on Saturdays is practically to exclude them altogether.

For the same reason regulation 7 is void in that it prefers members of the golf club before the public at large. It is also void in that it prefers inhabitants of Mitcham before the public. The commons were dedicated to the public at large as well as to the inhabitants of Mitcham. The granting of permits to this class is merely an indirect way of preferring them, and this

(1) 5 Q. B. D. 155.
(2) (1894) 58 J. P. 718.
(3) (1907) 6 L. G. R. 92.
(4) (1897) 61 J. P. 807.

preference has not even the colour of a consideration to justify it. It is true that the playing of golf on Mitcham Common must be ordered and restricted by regulations, but the regulations must apply to all equally. A regulation purporting to set aside part of the common for a particular class is partial and unequal and therefore void. If the circumstances of this case should justify a preference, the preference ought to have been conferred by by-law considered and passed by the Local Government Board. It cannot be conferred by a mere regulation. For these reasons regulations 5 and 7 are void.

Regulation 2 is unreasonable and void also in that it involves an unjustifiable interference with the liberty of those subject to it: *Kruse* v. *Johnson*. (1) The justices were therefore right in dismissing the informations.

*Danckwerts*, *K.C.*, in reply.

*Cur. adv. vult.*

May 30. The judgment of Phillimore and Hamilton JJ. was read by

PHILLIMORE J. Informations were laid by the appellants against the respondents for that they severally broke No. 14 of the by-laws for the regulation of Mitcham Common in that each played golf without a caddie and Cox played on a Saturday on the golf club course, he not being a member of the club, and Cole also not being member of the club played without a permit. The facts were proved as laid, but the magistrates declined to convict, and stated a case for the opinion of the Court.

Both respondents were inhabitants of Mitcham, but this gives them no other advantage over the rest of the King's subjects than to qualify them for a permit under the by-law if such a permit can be required.

The by-law and the regulations applicable to these cases are as follows: [The judgment set out by-law 14 and regulations 2, 7, and 8, and proceeded.]

It is said that these regulations are unreasonable and unequal and ultra vires, that if made at all they should be made as

(1) [1898] 2 Q. B. 91.

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by-laws with the requisite consent, and that if they are covered by the by-law then the by-law must be bad.

It is necessary to give some consideration to the general law as to commons. There are several classes of commons. But such a common as we are dealing with is part of the waste of a manor, or manors, over which the freehold and copyhold tenants of the manor or manors, and possibly others, by custom have certain rights. Subject to these rights the soil and all rights in it belong to the lord or lords of the manor or manors. The public, that is the King's subjects generally, have no rights over a common even if they be inhabitants of a parish or manor in which the common lies. But so many people have rights over them that such commons are rarely enclosed, and there are both practical and legal difficulties in the way of any steps being taken to restrain the public from walking and taking their pleasure on them, if no physical damage is done thereby.

The commons round London had become to such an extent pleasure grounds for the inhabitants of the metropolis, and it was so important to preserve them for this purpose that in 1866 the Metropolitan Commons Act was passed. Mitcham Common is one of these commons, and a scheme was framed for it, which was itself confirmed by statute in 1891 (54 & 55 Vict. c. xxvi.). By the scheme no rights of property are vested in the conservators. The scheme is not altogether well drawn: for instance by an error of human frailty well known to those who have experience in drafting the main object of the scheme is hardly mentioned. If one did not know enough of the history of this legislation to look for it, one might almost miss it. Enough, however, is to be found to indicate that the conservators are to preserve the common by inclosure, exclusion, and regulation, for the recreation of all those of the King's subjects who desire to walk and divert themselves upon it, in other ways than by organized games. Along with this comes the provision in clause 18 empowering the conservators to set apart portions of the common for organized games and to form and partially enclose ground for these games. It is under this clause and clause 19 that by-law 14 has been made, and it is under this

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clauses and the by-law that the regulations if valid are to supported.

The inequality of these regulations is obvious. They give ial advantages to the inhabitants of Mitcham over the rest ie public, and they give further advantages to the members rince's Golf Club over the inhabitants of Mitcham and over rest of the public: see *Kruse* v. *Johnson*. (1) This inequality referring members of the golf club is justified first by reason ownership of the soil, and secondly by reason of the golf nd having been made and being kept up by the club or by ie one whose rights have passed to the club.

ne two reasons must be kept separate, though the narrative arly the same for both. [The judgment stated the facts ting to the foundation of the Prince's Golf Club and ce's Ladies' Golf Club and the devolution of the rights of lords of the manors to the conservators, and proceeded.]

ow the scheme recognizes the proprietary rights of the s, but postpones them to that enjoyment by the public, both ay of general recreation and in organized games, for which scheme provides. It goes on to give compensation if injury used to the proprietary rights by such postponement. This pensation is to be in money. The conservators now have the orial rights in the soil, but it is not competent for them to these rights in derogation of the scheme. Neither could they e let the lords as such have any exclusive or any perpetual ts of recreation, nor can they effect the same object by a itous process. The regulations cannot be supported on this und.

ie scheme does not contemplate the acquisition by the con- ators of the rights in or over the commons claimed by the s of the manors except so far as the continuance of such rights interfere with the control, preservation, or improvement of commons by the conservators or with any of the purposes of this me: see clauses 38 and 40. The dispute in pursuance of h the action was brought, which ended in a settlement on erms, inter alia, of conveying the manorial rights to trustees the conservators, was one in which the Prince's Club itself or

(1) [1898] 2 Q. B. 91, at p. 99.

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its predecessor was setting up against the conservators a right to injure the surface of the common by cutting turf and digging gravel, a dispute happily settled long ago. Apart from such interference the scheme must be deemed to have provided in itself to the satisfaction of the Legislature the requisite powers of management, improvement, and control, without intending that the conservators should get in manorial rights which were by its provisions expressly saved. Doubtless as private persons the conservators are not disabled from being beneficially interested in such rights, but they can only enjoy them, and as conservators are bound to use them as they are to use land forming part of the common, namely, for the purposes of this scheme, that is to say for the good of the public at large, not discriminating between class and class, nor assuring privileges to some nor denying benefits to any. The conservators, however, are not precluded from using their rights as owners of the soil nor from contracting to use these rights for the benefit of the club; and, while they cannot as owners of the soil interfere with persons using the common in accordance with the scheme and with by-laws validly made under it, they can as such owners use any rights they may have to remove trespassers. And it may be that all those who use the common otherwise than in accordance with the scheme and such by-laws are trespassers and could be removed, and that the two respondents, playing as they were at a game which has an element of danger in it and interferes with the free user of the common by others, were trespassers, not being licensed so to do, and could have been removed. This, however, does not give a right to lay an information against them and get them fined.

We now come to the other reason which is put forward in support of the regulations. There is no doubt that the club and its predecessor in title, Mr. R. H. Cox, has spent and spends much money in making and preserving the golf ground. Does this expense authorize the preferential treatment for members of the club provided by these regulations? And, if such treatment can be authorized, can the authority be given by mere regulation or must it be by by-law? Clause 19 of the scheme contemplates by-laws and regulations, provides that by-laws shall have no

force unless approved after a certain procedure which gives opportunity for objectors to make their objections heard by the Local Government Board, and enforces their observance by a fine. The scheme says nothing more about regulations. It speaks of the by-laws regulating the playing of games and, in one passage, of the by-laws containing regulations. It is clear that for many purposes subordinate or minor regulations, often temporary, will need to be made, such as regulations enforcing enclosures made under clause 16. There is no reason why, under "the regulation of games to be played," should not be included regulations fixing the time for play, its beginning and its ending, and forbidding play to all on certain days, deciding where the players are to begin and where to end, the intervals between sets of players, the order in which they are to follow one another, the total number who may play at once, and the means by which those who are in waiting shall take their turn. They might provide also for the arrangement of matches on days fixed beforehand. Regulations may include precautions for the safety of the public and the preservation of the turf. The conservators may even, without written regulation for every case, delegate to their appropriate officers the impartial decision ad hoc of questions and disputes which require immediate adjustment. It may be that they may by regulation classify the players who are to use a particular spot with reference to their proficiency or skill, and assign, for example, a deep pond to swimmers, or a clear piece of ice to adept skaters, one ground to children and one to men, one spot to persons who come together and wish to play together, and another to others. And as regulations can best be enforced by treating those who infringe them as breakers of a by-law, there is no objection to a by-law which provides that games should only be played according to regulations (if the regulations be of the nature indicated) so that persons who play in defiance of the regulations may be proceeded against and fined for breach of the by-law. It was hardly disputed that such a regulation as that, (No. 4), which provides that players at golf shall start from the first tee, or that, (No. 2), which provides that they shall be accompanied by a caddie, were regulations of this class.

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Regulation No. 2 is expressed and has been explained as being made for the preservation of the turf, the better order of the game, and the safety of passers by. As such there is no objection to it. Nor is there any objection to requiring caddies to be authorized or licensed. The objection to the small fee of 1*s.* was abandoned during the argument. Both respondents infringed regulation No. 2 by playing without a caddie. Therefore they broke by-law 14 and ought to have been convicted.

This way of looking at the case might dispense the Court from passing upon the more serious question of preferential treatment. But it would be inconvenient to take this course, after the parties have come before us at great expense to argue the point. The question of preferential treatment thus raised is one of greater difficulty. It is one thing to make such regulation of games as we have indicated, but it is another matter if the conservators seek by regulation to reserve any part of their common to private associations or to particular classes so as to exclude or to subordinate as a regular thing persons outside such associations or classes. The "regulation and management" of commons which the Legislature contemplated were for the equal good of all. The object of such schemes is "to secure in perpetuity the common as a place which the public might use as of right for the purpose of recreation." "The user of the common is necessarily placed under regulations," but why? "In order that all classes may at all times share in its enjoyment": *De Morgan* v. *Metropolitan Board of Works*. (1) Clearly then the public at large has equal rights with others to play golf on the parts of the common set apart for golf. Much has been made by the appellants' counsel of the argument that the conservators had come under a legal duty or at least a moral obligation (it matters not which) to secure this priority and privilege to the golf clubs. They have agreed during the currency of their licence "not knowingly to permit any person or persons other than those authorized by the company or residents of the parish of Mitcham to play golf or any other game on the said courses" in consideration of the creation or maintenance of the courses at the clubs' expense, and of other payments applicable by the

(1) 5 Q. B. D. 155, at p. 158.

conservators to general purposes. This preference was further justified in consideration of the conveyance by the Prince's Club to trustees for the conservators of the soil of the common and the manorial rights therein which have been already mentioned. It was said that for the benefit of the public and the improvement of the common, the conservators might make reasonable bargains with third parties, so as to secure the execution of works which they could not afford to undertake themselves; that to acquire golf courses and get them kept up and obtain the benefit of the rights of the lords of the manors (saving that of appointing a conservator which the club retained) upon the terms of giving to the clubs from whom these benefits were derived the priorities and privileges in question was no more than it was reasonable for conservators to do. But if by-laws tending to grant such priorities and privileges are bad, as being beyond the powers of the conservators under the scheme and "repugnant to the laws of England," they will not become good because the conservators may feel bound or impelled to make them in order to implement some contract they have entered into or to discharge some supposed obligation. Upon the whole we think that lawful preferential treatment is the exception and is a question of degree. If the conservators have not funds to lay out a golf course or to make, roll, and water proper cricket pitches or bowling greens, and clubs are willing to go to the initial and continuous expense necessary to make and maintain them, there may be circumstances in which conservators may, for the sake of all players, give some preference to those who will make and keep the playgrounds. But the preference must be so temporary or so discontinuous as to leave substantial and ample opportunities to the non-preferred, and not unduly to interfere with the non-playing public. Here the regulations absolutely and at all times exclude all but inhabitants of Mitcham and members of the club. This cannot be justified. Further, the conservators cannot, by requiring licences or permits to be taken out, create a preference indirectly which could not be justified directly. Licences or permits are unobjectionable so far as they are part of the machinery of legitimate regulation. As soon as they become mere means of discrimination or hindrances in the

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way of one class from which other classes are free they cease to be justifiable and cannot be required. The Metropolitan Commons Acts were not passed for the inhabitants of Mitcham, but for the public of the metropolis and the country at large, and the dweller in Kensington has as much right to recreate himself there as the dweller in Mitcham.

The regulations also give a preference to the members of the club over the inhabitants of Mitcham and all others, which may be so serious as to leave to the latter no substantial opportunities of play. Whether this be so or not, and whether the suggested consideration be adequate or not, we cannot tell. Sufficient facts are not found. We were told at the Bar that Saturday is the only possible day for the respondents and others in like position. It may be so, but the fact is not found. We were told that the ladies' golf course, which is given as an alternative, is very inconvenient. We make the same answer. Further, we do not know whether the respondent Cole and others in his position would have had any difficulty in getting a permit, or whether he was merely asserting what he conceived to be his rights in playing without asking for one. Neither do we know whether it would have been impossible for the conservators to get money under clause 24 of the scheme or from local authorities under clause 24 of the Act of 1866, nor the exact quantum of benefit which the club has given. But we can see enough to infer that this preferential treatment carried to this extent may be very serious for others. We can see that the argument that private expenditure upon a public common may constitute a claim to special and even exclusive enjoyment of it is one that requires close scrutiny. We think that before conservators resolve upon or are permitted to grant such a preference to a class, in derogation of the equal rights of the public, the real necessity and the general advantage of the arrangement ought to be clearly made out. Hence we think that such matters should be passed upon by the Local Government Board, which can hear objections to a proposed by-law; and we come to the conclusion that the preferential treatment in the present case, permanent as it is, and exclusive as it is, could not at any rate be granted by mere regulation. There must be at least some indication in

the by-law that preferential treatment is to be given, and some authority, however general, to give it must be expressed in the by-law. There being none, regulation 7 is ultra vires, and no one could be punished under the by-law for breach of it.

On this larger point the appellants fail. But the case must go back to the justices with a direction to convict each respondent for playing golf without being accompanied with a duly authorized and licensed caddie.

SCRUTTON J. read the following judgment:—These were two appeals by special case stated from the refusal of magistrates for the county of Surrey to convict R. H. Cox and George Cole respectively of offences against by-law 14 made by the conservators of Mitcham Common.

Cox was charged with playing golf on a part of the common set apart for that purpose by the conservators at a time, namely, Saturday, and in a manner, namely, without a caddie, not allowed by the regulations of the conservators. Cox was an inhabitant of Mitcham and had a permit to play golf on the common in accordance with the conservators' regulations. Cole, who played on a Friday, was charged with playing golf on a part of the common set apart for that purpose by the conservators in a manner, namely, without a caddie, and without a permit from the conservators, not allowed by their regulations. Cole was also an inhabitant of Mitcham.

The case is of general importance. The principles governing it affect not only Prince's Golf Club at Mitcham and other persons who desire to play golf on the course provided and kept up by that club, but they also may affect all golf played on commons, where clubs keep up a course, such as, to take only two examples, Blackheath and Westward Ho! And the relevance of these principles is not limited to golf, but affects the numerous clubs generally of working men who play cricket or football on fixed portions of metropolitan commons or parks, frequently spending money on the cricket pitches or football grounds they are allowed to occupy, and it may extend further to clubs for bowls, or lawn tennis, making similar uses of prepared grounds.

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The facts of these cases are as follows. Before 1891 certain waste lands near Mitcham belonged to five manors. The commoners had certain rights of pasturing cattle, and probably of cutting litter and turf. So long as the lords of the manors did not interfere with these rights they could enclose the commons, dig gravel from them, and otherwise destroy or disfigure them. The proximity of the commons to London was lessening the number of genuine commoners who could restrain the lord from enclosing, while litigation against him was expensive. Only the accident that the Corporation of London had a cemetery which occupied the site and had the rights of a commonable tenement enabled them to preserve the commons and wastes composing Epping Forest from the enclosures of the lords. For the public, not commoners, though they walked about on sufferance, had no legal rights in the common. This had led to the passing of the Metropolitan Commons Acts of 1866 and 1869.

These Acts forbade further enclosure of metropolitan commons under the Inclosure Acts, and allowed the preparation of schemes by which such commons might be regulated by commissioners who, while making compensation for any rights extinguished, might maintain the commons for public enjoyment and recreation. The position of such a common was considered by Lush J. in the case of *De Morgan* v. *Metropolitan Board of Works*. (1) There by a scheme under the Act of 1866 Clapham Common was dedicated to the use and recreation of the public as an open and unenclosed space for ever, to be regulated and managed by the board. The board made a by-law prohibiting the "delivery of any public speech, lecture, sermon, or address of any kind or description whatever, except with the written permission of the board first obtained, and upon such portions of the common and at such times as may by such written permission be directed and sanctioned by the board." This by-law was objected to as invalid, and it was argued, that the common having been "dedicated to and for the use and recreation of the public as an open and unenclosed space for ever," the board could not prevent the public from assembling there whenever they pleased for the purpose of hearing sermons, or lectures, or addresses, on any subject,

(1) 5 Q. B. D. 155.

religious, political, or otherwise. In giving judgment Lush J. said (1): "If this argument were sound it would follow that any number of public meetings might be held at the same time in various parts of the common, even to the extent of monopolizing the whole area, to the disturbance of the neighbourhood and the exclusion of that portion of the public who desired to use it for the purpose of recreation. We are satisfied that such was not the intention of the scheme which Parliament has sanctioned. Its object was to secure in perpetuity the common as a place which the public might use as of right for the purpose of recreation, and in order that all classes may at all times share in its enjoyment, the user of the common is necessarily placed under regulations. By-laws are a code of restrictions. Modes of user which, if enjoyed without limitation as to time or place, would unduly interfere with the comfort and enjoyment of others, such as riding, boating, cricketing, bathing, and the like, are put under reasonable restrictions. It is equally necessary that the holding of public meetings on the common should be also put under regulation. And what can be a more reasonable mode of regulating such meetings, than to require information beforehand what the object and character of the meeting are, in order that the board may be able to judge whether it is such as ought to be allowed on the common, and if so to prescribe reasonable limits as to time and place?"

Under the Metropolitan Commons Acts a scheme was prepared for the Mitcham commons sanctioned by the Board of Agriculture, and confirmed by a local and personal Act of 1891 (54 & 55 Vict. c. xxvi.). Under it the regulation and management of the commons were vested in a board of conservators, of whom twelve were elected by local authorities, and one by the lords of the manors within whose bounds the commons lay. The scheme did not affect any existing right of lords of manors or commoners, but gave the conservators the power of restricting, diminishing, or extinguishing such rights by the payment of compensation. The lords had therefore the right of themselves digging in the soil so long as they did not affect the rights of the commoners; and could stop other people from digging on the soil. As

(1) 5 Q. B. D. at p. 158.

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applied to golf the lords could themselves dig bunkers and could stop other people, such as the conservators, from digging them. Subject to this, the conservators were to maintain the natural features of the commons, but were to set apart such portion or portions of the commons as they might consider expedient for games. They might form grounds for cricket or other games. They had power to frame by-laws and regulations for the prevention of nuisances and the preservation of order upon the commons, including the regulation of games to be played on the commons. By-laws were to be confirmed by the Local Government Board. Nothing is said about the necessity for confirming regulations.

Pausing for a moment to consider the position, Parliament has placed in the hands of a body of conservators, almost entirely elected by representatives of the locality, the right of regulating by by-law the user of the common for recreation and for games. In the first place, on the authority of *Kruse* v. *Johnson* (1), in the words of Lord Russell C.J. (2), "But, when the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. . . . . But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think Courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness." Secondly, as pointed out by Lush J. in *De Morgan* v. *Metropolitan Board of Works* (3), user by the public in the case of

(1) [1898] 2 Q. B. 91. (2) [1898] 2 Q. B. at p. 99.
(3) 5 Q. B. D. 155.

ames must be restricted to allow of any effective user at all. ll the world, or even all the dwellers in the locality, cannot play ricket or football on Mitcham Common on the same Saturday fternoon; some must be excluded. And any attempt to be igidly and mathematically just and fair, by taking each applicant n order of priority, will only result in no effective user at all. You can hardly put the first twenty-two applicants in order of ime to play cricket together on one pitch, and the first thirty pplicants, whether previously unknown to each other or not, to lay Rugby football. Such sports can only be pursued by rganized clubs who can only efficiently manage them if they re sure of a pitch for the season and so can arrange a fixture st of matches. A club can only arrange matches if it can say to prospective opponents "I am sure of a ground." If it can nly say "By the justice of the conservators, if I can get a round on June 17 in competition with other applicants I will lay you," it will not get any matches at all. And permanent ser by such a club may exclude other players or clubs. Yet it vould be impossible, in my opinion, to condemn such an arrangeent as "partial and unequal between different classes," or manifestly unjust" - to use again Lord Russell's words in *Kruse . Johnson*. (1) It is rather the effective way of regulating the ser, the details of application of which must be left to the locally elected authority.

Further, some games, such as cricket, bowls, lawn tennis, and olf, cannot be played without prepared grounds. The conervators may have no funds with which to make such grounds, nd if they have funds from local authorities or otherwise they annot make the bunkers or greens necessary for a golf course vithout the consent of the lord of the manor who owns the soil. They may, in my opinion, procure the co-operation of local lubs who undertake to make and maintain the grounds on he terms that they shall have priority of user at certain times, r of the lord of the manor, who will make the course on his oil, on terms that he has priority of user. The public gain by etting without cost grounds to play on and grounds which are ree, subject to certain prior privileges to those at whose expense

(1) [1898] 2 Q. B. 91, at p. 99.

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or by whose abandonment of legal rights they are provided and maintained. Again, it seems obvious that the conservators cannot put into by-laws all the terms on which each game is to be played, or each part of the common used for recreation. It must be sufficient for them to prohibit by by-law user of parts of the commons except by their permission and on terms granted by them, in other words, to take the course approved in *De Morgan* v. *Metropolitan Board of Works* (1) already cited.

Lastly it is clear law that "if a by-law can be divided, one part may be rejected as bad, while the rest may be held to be good": per Lindley L.J. in *Strickland* v. *Hayes*. (2)

With these general considerations I turn to the facts of the particular case.

Up to the time of the scheme no golf had been played on the commons by any one. Golf cannot be played without prepared tees for starting from, and putting greens for holding out on, and a good course requires a suitably mown fairway and suitably placed bunkers for catching bad shots. It is an expensive matter to make such a course and to keep it in order, and, as pointed out, to make a course interferes with the rights of the lords of the manors in the soil. About the time when the scheme was in contemplation, it was also in contemplation to form a golf club on the common to be known as Prince's Golf Club. To strengthen their legal position the founders or promoters of this club acquired the lordships of two of the manors which included the common, and with them the soil of the common, subject to the commoners' rights. And from this legal position as owners of the soil they were working on, they proceeded at considerable expense to lay out a golf course. There was some friction between the conservators and commoners and the golf club, of the kind that is usually terminated by the landowners and tradesmen of the locality discovering that the gain to them from the influx of golf players is much greater than the slight interference with their common rights. In this case the friction got as far as a writ by the conservators, but at length an amicable settlement was arrived at in 1893-1894. The club transferred to the conservators the rights of the lords of the two manors they had acquired and

(1) 5 Q. B. D. 155. (2) [1896] 1 Q. B. 290, at p. 292.

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undertook to pay an annual rent of 60*l*. In return for this the conservators granted the club a licence to play golf on the course they had laid out for twenty-one years, and undertook not to interfere with the club's playing golf on the course nor to allow any person other than members of the club or inhabitants of Mitcham to play golf on the course. It will be noticed that neither the conservators nor the inhabitants of Mitcham incurred any expense either in laying out or keeping up the course. The inhabitants of Mitcham, indeed, were particularly favoured. They got their golf for nothing; they obtained the benefit of the transfer of the club's manorial rights to the conservators; and members of the public if not inhabitants of Mitcham or members of the club, were excluded from the course. A ladies' golf course was laid out on similar terms, and maintained by the ladies' club, paying a rent of 40*l*. a year to the conservators. In 1901 the existing licences were surrendered and a new licence for thirty years from December 31, 1900, granted to the club at a rental of 250*l*. a year. The conservators were not to interfere with the playing of golf by the members of the club, nor to allow others than members, and inhabitants of the parish of Mitcham, to play golf thereon. The inhabitants of Mitcham still preserved their favoured position beyond other members of the public of getting a good golf course for nothing.

The conservators had purported to act under section 18 of their scheme by setting apart the ground occupied by the course for the game of golf. They made by-laws which were sanctioned by the Local Government Board. By-law 14 provided that no person should play at golf upon the parts of the common set apart for it except at such times and under such regulations as the conservators might from time to time prescribe. The conservators accordingly issued regulations. Regulation 7 forbade any person to play on the course unless he was a member of Prince's Golf Club, or an inhabitant of Mitcham holding a permit from the conservators. Regulation 2 required each player to have a caddie licensed in a particular way at a charge of 1*s*. per round, I protest against a Court who may know much or nothing about golf or caddies being called upon to decide whether this regulation made by the locally elected authority is good or bad.

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But if I am to consider it I remark that a round takes about two hours, and the charge of 1*s.* per round is a very usual one at London clubs. The object of requiring a caddie is threefold. First, he is there to warn the public present on the common of the risk of being hit, and his employer of the risk of hitting them. On Blackheath no golf is allowed by the London County Council, unless a fore-caddie is employed for this purpose. Secondly, in golf, most good players and all bad players in making their stroke cut out a divot of turf: it is the caddies' business to replace the turf so removed, and if this is not done, the turf is soon destroyed. Thirdly, the enjoyment of golf to some extent depends on players throughout the green moving at an even pace. Couples without a caddie generally play slower than those with a caddie, so much so that at many clubs a rule prevails that players without a caddie may be passed by players with a caddie. Less time is also spent in looking for lost balls if a caddie is employed. Cole, however, insisted on playing without a permit from the conservators and without a caddie and was accordingly summoned under by-law 14 for playing golf not under the conservators' regulations.

Regulation 5 restricted the play on Saturdays of persons not being members of the golf club to the ladies' course. Cox claimed to play on the men's course on Saturdays and to play there without a caddie and was summoned for a similar offence under by-law 14.

The magistrates held that the regulations must be treated as incorporated in the by-law. In Cole's case they held the resultant by-law bad, (1.) because it was partial in requiring a permit to be obtained by others than members of Prince's, (2.) because it was partial and unreasonable to require such a player to take a caddie, (3.) because there was no authority to make a fixed charge for a caddie and the by-law in this respect was unreasonable.

In Cox's case they repeated the second and third reasons in Cole's case, and further found that the exclusion of non-members of the club from the men's course on Saturdays and the allotment of the ladies' course to them on that day was unreasonable and partial.

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It cannot be denied that members of Prince's Club are place by the regulations in a different position from non-members. They need not get a permit; they have the monopoly of the men's course on Saturdays, and priority on other days. They appear to be subject to the regulation as to caddies. But they start in a different position from the inhabitants of Mitcham. Their money made the golf course; their money keeps it up; it was made on their soil as lords of the manor, and they have transferred this soil to the conservators in consideration of leave to play on the common, for which they pay a large annual rent. Being members of a club which can expel them, there is a guarantee for their good behaviour. The question appears to me to be, are the conservators authorized to make a distinction between classes, when one class consists of the people who have formed and maintain the golf course, and transferred property to the conservators in exchange for licence to play, and the other of people who pay nothing for the golf course, and are merely asking to use without payment, and for the purpose of a game not previously played on the common, a course which others have established and maintained, and which the inhabitants could not if they had the funds have established for themselves in view of the rights of the lords? For the general reasons already stated, I see no objection to the course taken by the conservators. They had no money of their own, but they have got others to establish and maintain a golf course on which the public can play, and to give them a rent, subject to this, that the people who pay shall have precedence in the use of the course they have established. This question is not confined to golf. Many small cricket clubs have every Saturday a monopoly of a cricket pitch on the metropolitan commons. It is essential to their fixture list that they should have a certainty of a pitch every Saturday, and highly convenient that they should have the same pitch on which they frequently spend money and labour in improvements. The magistrates' decision, as I follow it, would condemn any preferential allotment to these clubs as partial and unreasonable, and would upset the arrangements of most of the cricket and football clubs playing on commons near London. The case of the golf club which makes the course seems to me

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much stronger, and in my opinion the conservators are justified in getting the course made for public use by granting preferential privileges to the makers, especially in view of the manorial rights they surrender and the rent they pay. The reasoning of the magistrates as to permits I do not follow; and it appears contrary to the decision in *De Morgan* v. *Metropolitan Board of Works*. (1) The member of the public who attempted to address public meetings on Clapham Common said it was unjust and unequal that he should be required to get a permit from the conservators before doing so. At Mitcham it is clear that some members of the public must be excluded, i.e., that the conservators may regulate the user of the golf course. For instance, if ladies are allowed to play indiscriminately on the men's course, the play of all the men will be interfered with. For the pace of the green is the pace of the slowest couple, and the series of matches playing at any time are all affected by the slowness or inefficiency of any one of them. The same remark applies to children under fourteen. Subject to the point of the conservators' excluding members of the public, other than inhabitants of Mitcham dealt with hereafter, I see no objection to the rule about permits. And I do not see why an inhabitant of Mitcham who can get a permit should refuse to get one, because it is not granted to other members of the public not inhabitants of Mitcham, except on the ground that the conservators are not entitled to regulate the persons who play at all, which appears to me contrary to *De Morgan* v. *Metropolitan Board of Works* (1) and untenable. I see no reason for interfering with the judgment of the conservators as regards the caddie. It follows that in the case of Cole, who desires to play without a permit and without a caddie, the magistrates should have convicted, the by-law, with the regulations which he infringes incorporated, not being open to any of the objections taken.

In the case of Cox I have already dealt with the point as to a caddie. His remaining objection, and no doubt the chief objection in the case, is that he is not allowed to play on the men's course

(1) 5 Q. B. D. 155

on Saturday. He is not stopped from playing golf on Saturday; the ladies' course is open to him; but priority amounting to monopoly of the other course is given to those whose money provides and maintains both courses and who granted the rights in the soil which alone allowed them to be made. Mr. Cox and Mr. Cole, in my opinion, get very good and extremely cheap golf, and I am not disposed to view favourably their insistence on equality with the people whose money alone has made this golf possible, and to whom the conservators owe their possession of the soil of the course, and the greater part of their revenue. If Messrs. Cole and Cox attacked the exclusion of the public other than inhabitants of Mitcham there would be more to be said for their contention; but this probably would not suit their views.

Holding, as I do, that the regulations which Messrs. Cox and Cole attack are not unreasonable, are severable from the other regulations, and need not be expressly made as by-laws, I do not find it necessary to consider some of the other regulations, which they did not break, but which were attacked in argument. I do not understand the validity of an objection, "I may play without a caddie on Friday because it is unjust to exclude me from the men's course on Saturday," or "I, an inhabitant of Mitcham, may start from the ninth tee, because it is unjust that a member of the public not an inhabitant of Mitcham should be excluded altogether." The regulations infringed and attacked seem clearly sensible. But I may say that an objection made in argument to the regulation requiring obedience to the rules and etiquette of golf seems untenable. The person admitted to the golf course must play golf, not some fancy invention of his own which he thinks is an improvement, such as playing two balls as a single player. And he must not interfere with the other matches playing, which is the object that the "Etiquette of Golf" is chiefly directed to.

But I desire to say that serious questions may arise on which I reserve my final judgment, as to the exclusion of golf players other than inhabitants of Mitcham, which at present I find difficult to justify. In my judgment the two cases should be remitted to

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the magistrates with directions to convict of all the alleged offences.

*Appeal allowed.*

Solicitors for appellants: *Eldridge & Newnham.*

Solicitors for respondents: *Alexander Aldred & Moore.*

W. H. G.

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*Feb.* 16, 17, 23, 24, 28; *March* 1.

## THE ATTORNEY-GENERAL *v.* REYNOLDS AND OTHERS.

*Rights of Common — Estovers — Turbary — Common Appurtenant — Ancient House — Destruction — New House in continuance of Ancient House — Rebuilding on Old Foundations.*

The destruction of an ancient house, to which rights of common of estovers and turbary were appurtenant, does not necessarily operate as an abandonment of those rights. The rights may be enjoyed as appurtenant to a new house erected in continuance of the ancient house, provided that no greater burden is imposed upon the servient land. The question whether the new house is or is not in continuance of the ancient house is a question of fact. In order to be a continuance of the ancient house it is not necessary that the new house should be built upon the foundations of the ancient house.

Dictum in *Costard and Wingfield's Case*, (1588) 2 Leon. 44, impugned.

INFORMATION by the Attorney-General on behalf of His Majesty heard before Hamilton J. on the Revenue side of the Court.

Since the commencement of the proceedings the defendant A. S. Reynolds had died. But the action had been revived, and the executors of A. S. Reynolds defended it upon the grounds set up in the answer.

The facts and arguments are fully stated and discussed in the judgment of the learned judge. From the first five paragraphs of the information the following facts appeared:—

His Majesty the King in right of his Crown is seised in his demesne as of fee of the soil of the New Forest. The unenclosed waste lands of the said forest are subject to certain commonable rights of limited extent and in favour of a limited number of persons specified in the register hereinafter mentioned, including certain rights of turbary and estovers or fuel wood.

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By Acts of Parliament 14 & 15 Vict. c. 76 and 16 & 17 Vict. c. 19, and by an Act of 1854 (17 & 18 Vict. c. 49), intituled "An Act for the settlement of claims upon and over the New Forest," Commissioners were appointed and provision was made for establishing a complete register of all such claims of common, and by s. 28 of the last-mentioned Act it was enacted as follows:—

"All claims made or which shall be made under the provisions of the said Acts or this Act of rights of common of pasture, pannage, or turbary, which shall be proved to the satisfaction of the Commissioners to have been enjoyed or exercised as of right, without interruption, by the claimant or persons through or under whom he claims, as from any time in the year 1800, shall be allowed by the Commissioners; but such rights shall be held and enjoyed according to the laws and assize of the said forest, and such rights of common of pasture shall be enjoyed and allowed only in respect of the cattle of the claimant levant and couchant on the lands in respect of which the claim is made; and no claim of common of turbary shall be allowed other than in respect of a messuage erected in or prior to the year 1800; and such turbary shall be allowed only for the necessary fuel of such messuage, to be therein burnt and expended as belonging and appertaining to such messuage."

The Commissioners under the Act of 1854 determined all the allowed claims and signed a register thereof, to which they annexed the following memorandum:—

"And we do hereby also declare that every allowance of turbary is of the liberty of having, digging, cutting, and taking turf in and upon the open wastes of our Lady the Queen within the said forest by the view and allowance of the foresters of the said forest, and of carrying away the same turf from the said places to and into the messuages mentioned and described in this our register for the necessary fuel of the said messuages, to be therein burnt and expended And that every allowance of fuel and fuel wood is an allowance of the quantity described of good fuel wood yearly from the open and unenclosed parts of the said forest by the view and allowance of the foresters of the said forest as reasonable and necessary estovers for the necessary firewood of

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the messuages mentioned and described in this our register, to be burnt and expended therein."

The defendant Arthur Sutherland Reynolds claimed to be entitled to common of turbary and to one load of fuel wood annually from the open and unenclosed parts of the said forest under a claim (No. 1098) in the register which was allowed to William Mansbridge of Cadnam in respect of an ancient messuage then existing in the parish of Minesteed in the county of Southampton referred to in the register.

The following is a copy of claim 1098 in the register:—

| Number of Claim. | Name, place of abode, profession, trade, &c., of claimant. | Whether claim allowed, disallowed, or amended. | Date of allowance, disallowance, or amendment. | Nature, extent, and particulars of claim as finally allowed or amended after having been objected to. | Lands or tenements in respect of which claim has been allowed or amended. |
|---|---|---|---|---|---|
| 1098 | William Mansbridge, Cadnam, Minesteed, Hants. Farmer | Amended | October 3, 1856 | Common of Turbary and one load of fuel wood | An ancient messuage situate in the Parish of Minesteed in the County of Southampton and numbered on the tithe map of that Parish 669 |
| | | | | Common of Pasture and Common of Mast Paying yearly fivepence halfpenny and one bushel of oats | 20a. 0r. 30p. of land situate at Minesteed aforesaid and numbered on the said tithe map 604, 669, 670, 671, 672, 673 and 674 |

The information went on to state that the ancient messuage had in fact been pulled down and altogether removed and that the rights of turbary and fuel in claim 1098 mentioned had thereby become extinguished; that the defendant had recently

erected in a garden and at some distance from any part of the site of the said ancient messuage a summer-house and tool-house combined; that he claimed to be entitled in respect of this erection to the turbary and fuel rights formerly belonging to the said ancient messuage; but that the erection so made by the defendant was not a messuage or dwelling-house at all, and in any case was not an ancient messuage, nor a messuage erected in or before 1800, nor was it built on the site of or a continuance in law of the ancient messuage in claim No. 1098 mentioned; and consequently that his claim was unfounded.

The information then stated that the defendant in pursuance of his claim had taken and converted to his own use fuel wood from the unenclosed parts of the said forest, and that, on the deputy surveyor in charge of the forest on behalf of the Crown refusing to allow him to continue to do so, the defendant had commenced and was prosecuting an action of *Reynolds* v. *Lascelles* [1908 R. 57] in the Chancery Division of the High Court against the said deputy surveyor for a declaration of the defendant's alleged rights and for an injunction to restrain the deputy surveyor from interfering with the said defendant in the use and enjoyment thereof, and for damages; that by the aforesaid proceedings and claims of the defendant the title and rights of His Majesty as owner of the soil of the said unenclosed waste lands were being impeached and brought in question and such title ought to be declared, and the defendant ought to be restrained from prosecuting the said action or otherwise interfering with the rights of the Crown in relation to the said lands.

The Attorney-General on behalf of His Majesty prayed as follows:—

(1.) That it might be declared that His Majesty is entitled to the soil of the open and unenclosed parts of the said forest freed and discharged from the claims of common of turbary and fuel wood allowed in claim No. 1098 in the said register and from the said alleged claims of the defendant, and that His Majesty might be quieted in possession against such claims.

(2.) That the defendant should be restrained by injunction from continuing the said action of *Reynolds* v. *Lascelles* and from doing any act or taking or continuing any legal proceedings to enforce

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such claims or to interfere with the property and rights of the Crown or with any of the officers of the Crown in relation thereto.

(3.) That if and so far as necessary the respective rights of the Crown and of the persons entitled to commonable rights within the said forest might be declared and determined.

(4.) That the informant might have such further or other relief in the premises as the case might require.

The defendant by his answer claimed to be entitled to common of turbary and to one load of fuel wood annually from the open and unenclosed parts of the forest under claim No. 1098 in the register allowed to William Mansbridge of Cadnam in respect of an ancient messuage then existing in the parish of Minesteed in the county of Southampton referred to in the said register and numbered 669 on the tithe map of the said parish; that the ancient messuage numbered 669 on the tithe map of the parish of Minesteed contained 1a. 0r. 35p. and, at the date when the register was signed, sealed, and deposited by the Commissioners pursuant to the Act of 1854, consisted of an ancient house and the curtilage, outbuildings, garden and orchard enjoyed therewith; that the ancient house having fallen into a ruinous state through age and dilapidation, it became necessary to rebuild the same, and that accordingly in the months of December, 1905, and January, 1906, it was by the defendant's orders pulled down and, with the exception of the old hearth which still remained, altogether removed; that in the early part of 1906 the defendant erected upon part of the premises numbered 669 on the tithe map (being orchard or garden ground) a building in close proximity to the site of the ancient house; that the building so erected was not properly described as a summer-house and tool-house combined, but was suitable for and intended to be used when convenient as a human habitation; and that he claimed in respect of the building so erected as part of the premises numbered 669 on the tithe map to be entitled to the turbary and fuel rights theretofore enjoyed in respect of the ancient house as part of the same premises.

*Sir Rufus Isaacs, A.-G.*, and *Austen-Cartmell*, for the Crown.

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The defendant claims these rights of turbary and fuel wood as appurtenant, not to the ancient house, but to the house and the land surrounding it. But turbary and estovers cannot be appurtenant to land.

In *Tyrringham's Case* (1) it was resolved that "prescription doth not make a thing appendant, unless the thing which shall be appendant agrees in quality and nature to the thing to which it shall be appendant . . . . as common of turbary cannot be appendant to land, but to an house, as it was held in 5 Ass. 9, for the thing which is appendant ought to agree with the nature and quality of the thing to which it is appendant, and turfs are to be spent in an house"; and "common of turbary or of estovers cannot be appendant or appurtenant to land, but to a house to be spent there": Co. Litt. 121b. *Sir Henry Nevil's Case* (2), *Bishop of Chichester and Strodwick's Case* (3), and *Valentine* v. *Penny* (4) confirm this. In the case of *Arlett* v. *Ellis* (5) the argument for the defendant is based on this foundation; but more important still is the fact that the argument for the plaintiff by the Attorney-General of the day admits the position and answers by way of confession and avoidance, where a direct negation would have made a short end of his opponent's case. That was a case where, in answer to a claim for trespass, the defendant justified under rights of common of pasture and turbary as appurtenant to a customary tenement parcel of a certain manor and consisting of a dwelling-house with a garden and a small quantity of land. At the trial a verdict was found for the plaintiff subject to an award of a referee with power to enter a nonsuit. The referee found the following facts:—The defendant was the customary tenant of the tenement, and as such had enjoyed common of pasture and turbary as his predecessors in title had done from time immemorial. He had leased this tenement to a lessee by whose sufferance he had built a new dwelling-house on part of the garden. Both dwelling-houses continued to be occupied for over ten years, when the old house fell into decay

(1) (1585) 4 Rep. 36b, 37a.
(2) (1570) Plowd. 377.
(3) (1613) Godbolt, 234.
(4) Noy, 145.
(5) (1829) 9 B. & C. 671.

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and was abandoned and subsequently pulled down. While both houses were occupied the tenant of the old house exercised the rights of common, but since the old house had been abandoned, the tenant of the new house had exercised the rights. At the date of the alleged trespass, which was after the destruction of the old house, the defendant was the tenant of the new house. On these facts the referee awarded that the verdict for the plaintiff should be set aside and a nonsuit entered. A rule having been obtained to set aside this award, the Attorney-General shewed cause and contended that, as to the common of pasture, the antiquity of the house was immaterial; but he admitted that as to the common of turbary, "inasmuch as turbary can be claimed only in respect of a house, there is greater difficulty." He avoided this difficulty by arguing that, as the right was at the most suspended, because "the defendants might at any time have revived that right by rebuilding a house upon the same site and of the same dimensions as the old one," and as the issue raised in the case was not the actual exercise of but the right to exercise the ancient right, he was entitled to have that issue found in his favour. That is a clear admission against interest that when the house is pulled down the right is gone unless and until the house is rebuilt upon the old foundations.

The more modern authorities are to the same effect. "An ancient right of turbary can only exist as being a right in respect of an ancient dwelling-house or building, or, at the most, for the house which supplies the place of that house": per Lord Hatherley L.C., *Warrick* v. *Queen's College, Oxford*. (1) That which is appurtenant must be appropriate to the principal to which it is appurtenant: *Baylis* v. *Tyssen-Amhurst*. (2) If estovers and turbary could be appurtenant to land they might well become appurtenant to a new house; but it has repeatedly been held that a right appurtenant to an ancient house cannot become appurtenant to a new house. "Si choses sont append' a un meason, uncor si le meason chiet, les choses reñ append' al soyle ubi meason stetit": Bro. Abr., tit. Incidences, pl. 40.

(1) (1871) L. R. 6 Ch. 716, at p. 730. (2) (1877) 6 Ch. D. 500.

"If a man have common of estovers by grant, he cannot build new houses to have common of estovers for those houses": Fitzherbert, Nat. Brev. 180 H.

In Manwood's Treatise of the Forest Laws, 4th ed. (1717), p. 133, it is stated that "a man may have estovers as appurtenant to a house . . . . and in such case, if the estovers are spent in any other house, 'tis a good cause of seizure of the same estovers, for this is an abuser which is a cause of forfeiture." The exact point that estovers appurtenant to an ancient house cannot be claimed in respect of a new house unless the new house is built upon the foundations of the old was decided in *Costard and Wingfield's Case.* (1) There the action was for replevin; the defendant avowed for damage feasant; the plaintiff justified the putting in of his cattle into the land where, &c., by reason that the town of N. is an ancient town, and that it had been used time out of mind, &c., that every inhabitant of the said town had had common for all manner of cattle levant and couchant within the said town. The defendant said that the house in which the plaintiff did inhabit in the said town, and by reason of residency in which house he claimed common, was a new house erected within thirty years; and that before that time there had not been any house there, upon which the plaintiff demurred. Anderson C.J. said that he who erects a new house cannot prescribe in the common, for then a prescription might begin at this day, which cannot be, and the judges all "agreed that in the principal case the plaintiff should not have common to his new erected house"; but the entry of the judgment was respited until the Court had seen the record, and after they had seen and considered upon the record, Anderson C.J. and Periam J. were of opinion as before: But Windham J. did encline to the contrary (2); "but they all agreed, that he who set up again a new chimney where an old one was before, should have estovers to the said new chimney; and so if he build a new house upon the foundation of an old house, that he should have common to his said house new erected: so if a

(1) 2 Leon. 44; Godbolt, 96, pl. 110; Anderson, 151, pl. 200; Gouldsborough, 38; Savile, 81; Owen, 4, sub nom. *Wakefeild's Case.*

(2) "Did not encline," in the 2nd ed. of Leonard (1687), sed quære.

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house falleth down, and the tenant or inhabitant sets up a new house in the same place." The principle on which this doctrine is based is laid down in *Luttrel's Case.* (1) That was an action by the owner of two mills, originally fulling mills but lately converted by him into grist mills, against the defendant for diverting water to the flow of which the plaintiff claimed to be entitled by prescription. The defendant contended that by building new mills the plaintiff had destroyed the prescription. But it was resolved that the prescription extended to these new mills, for that, among other reasons, the plaintiff might claim to have the watercourse to his mill generally, and then he might alter the mill into what nature of a mill he pleased, provided always that no prejudice should thereby arise either by diverting or stopping of the water. The report proceeds: "So if a man has estovers either by grant or prescription to his house, although he alter the rooms and chambers of this house, as to make a parlour where it was the hall, or the hall where the parlour was, and the like alteration of the qualities, and not of the house itself, and without making new chimnies by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions will be destroyed, and although he builds new chimney, or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers in the new chimnies, or in the part newly added." Further on in the report it is stated that "another reason was added (2) that when a man has anything appendant or appurtenant to an house or mill, the most perdurable part of it is the land in which the foundation is, and upon which the whole fabric of it consists and in respect thereof, by grant of all his lands, all his houses, mills, and woods will pass . . . . The prescription or grant shall respect the most durable part, and which in judgment of law includes the whole. And therefore it was resolved that although the house or mill falls by the act or default of the owner, or by the wrong of another, yet forasmuch as the perdurable part, and which includes the whole, remains, he may rebuild it without any loss of any appendant or appurtenant to it, but it ought to

1 (1601) 4 Rep. 86a. (2) 4 Rep. at p. 87b.

be upon the same place which was the old foundation of the old house: for as that supported and in judgment of law included the old house when it stood, so it shall support and include the new house, and so in a manner is a continuance of the old house; and so the quære which Perkins makes fol. 128 well resolved." *Brown and Tucker's Case* (1) accords with this; and in *Cowper* v. *Andrews* (2) it was held that "if a man have common of estovers to his house, and suffer his house to fall down, he can now claim no estovers; and if he sue for it, and the other plead that his house is down, he shall not have judgment with a ceasing of execution, till he have re-edified his house, as in a warrantia chartae, or a writ of mesne, . . . . But in the case of estovers the plaintiff shall be barred, for at the time of the action brought he hath no right of estovers, but it is in suspence, and therefore it is not a perpetual but a temporal barr, and if he re-edifie his house in the same place, he shall have his estovers again. And so I think, if he had pulled down his house and built it again . . . ." In *Bryers* v. *Lake* (3), an action of trespass for cutting down and carrying away wood where the defendant justified as a commoner for estovers, "it was said that if an ancient cottage which had common be fallen down, and another cottage is erected in the place where the old cottage stood; this is no new cottage, but it may claim common as an ancient cottage by prescription, Nota." In *Dunstan* v. *Tresider* (4) the plaintiff brought an action of trespass; the defendant pleaded that the locus in quo was parcel of a manor; that a certain ancient messuage and twelve acres of land were parcel and a customary tenement of the manor; that the tenants of the customary tenement had rights of common and turbary, and that he, the defendant, was tenant of the customary tenement. The plaintiff denied the custom and gave evidence that the defendant's messuage was built within the last twenty years and not built upon the site of any ancient messuage; and it was held that he had disproved the custom.

From these authorities it follows that when the house to which estovers are appurtenant falls or is destroyed the right to

(1) (1611) 4 Leon. 241.
(2) (1613) Hob. 39.
(3) (1655) Sty. 446.
(4) (1792) 5 T. R. 2.

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estovers is gone also, or at any rate it is suspended. To revive the right it is necessary to build the new house as a continuance and on the exact site and foundations of the old house. Even then the new house must not put any greater burden upon the wood from which the estovers are taken than it had to bear while the old house was standing. That is to say, the right claimed in respect of the new house is to be measured by the chimney capacity of the old house. The importance which the law attaches to the site of ancient messuages fallen into ruin finds expression in s. 53 of the General Inclosure Act, 1845 (8 & 9 Vict. c. 118), which enacts that all tofts, foundations, or sites of ancient commonable messuages or cottages, shall, upon proof being made as therein provided that commonable messuages or cottages formerly stood thereon, be deemed commonable messuages or cottages, and the respective proprietors thereof shall be entitled to the same compensation as if the messuages and cottages were still standing.

Common of estovers may no doubt be granted originally in gross; but if they were originally granted as appurtenant to a house they cannot subsequently be severed from the house and held in gross. In the Year Book Mich. 5 Hen. 7, f. 7, pl. 15, it is said that common appurtenant can be made in gross . . . .; but of common of estovers to be used in such a house, that cannot be severed and be made in gross, neither common appendant, which is ratione tenementi. In *Sir Henry Nevil's Case* (1) the argument of "an apprentice of the Middle Temple" is very much in point. He contended (2) that if one grants estovers to another to be burnt in such a house, they are appurtenant to the house. And so if common is granted in such a place to one for his cattle levant and couchant in his farm of Dale, the common is made appurtenant to it; so that he who afterwards has the house, by whatever title he comes to it, shall have the estovers, and he who afterwards comes to the farm shall have the common. "And the estovers cannot be severed from the house, nor the common from the farm, but by extinguishment; for if he who has the house will grant the estovers to another, reserving the house to himself, or the house

(1) Plowd. 377. (2) Plowd. at p. 381.

to another reserving the estovers to himself, the estovers shall not be severed from the house thereby, because they shall be spent in the same house."

Now it is clear that the rights of turbary and fuel wood claimed by the defendant are, both by immemorial user and by the Acts of 1851 and 1854 and the register made thereunder, which only declared the rights at common law, appurtenant to "the messuages mentioned and described" in the register. The messuage described in the register and therein numbered 1098, being the messuage in question, is "an ancient messuage situate in the parish of Minesteed in the county of Southampton and numbered on the tithe map of that parish 669." The only remaining question therefore is as to the meaning of "messuage" in the register. From the authorities cited above it is plain that in connection with turbary and estovers in the nature of fire bote "messuage" must mean the house itself, or the foundation and site of the house as being the most perdurable part thereof in the language of *Luttrel's Case* (1), and cannot mean the land surrounding the house, as the defendant contends. Moreover a comparison of all the instances of the use of the word "messuage" in the register shews that it is used in the sense of house except in two cases, in each of which the house and all the land and buildings held therewith are described as "the said tenements messuages mills and premises." More important still is the fact that in s. 28 of the Act of 1854, which is the spring and origin of the register itself in so far as it deals with turbary, the word "messuage" clearly means house and nothing else. It is true that the messuage is described in the register as "numbered on the tithe map of that parish 669," and that 669 includes land and not merely a house; but the reference to the tithe map is only for purposes of identification and not of definition. If this be the true view the defendant has lost the rights which he claims, because it is common ground that the new building is not upon the foundations of the old house.

*Danckwerts, K.C.*, and *Gurdon*, for the defendant. Common appurtenant, differing in this respect from common appendant, which cannot at the present day be created even by Act of

(1) 4 Rep. 86a, at p. 87b.

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Parliament without repealing the statute of Quia Emptores, may be granted at any time by act inter partes and a fortiori by Act of Parliament: Co. Litt. 121b, note "appendant" to s. 184; Fitzherbert, Nat. Brev. 180, 181; Com. Dig. Common (C) Appurtenant; *Countess of Arundel* v. *Steere* (1); *Hayes* v. *Bridges* (2); *Cowlam* v. *Slack*. (3) The Acts of 1854 and 1858 operated as a statutory grant of turbary and estovers in the nature of fire bote appurtenant to the messuage numbered 669 on the tithe map of the parish of Minesteed. The first question therefore is what is meant by "messuage." In construing an Act of Parliament the rule is that words are to be taken in their legal sense: *Stephenson* v. *Higginson* (4); *Commissioners for Special Purposes of Income Tax* v. *Pemsel*. (5) When the Legislature uses technical language in its statutes, it is supposed to attach to it its technical meaning, unless the contrary manifestly appears: *Burton* v. *Reevell* (6), per Parke B. The legal and the technical meaning of "messuage" are one and the same.

In Termes de la Ley (ed. 1708), p. 201, curtilage is defined as "a garden, yard, field, or piece of void ground lying near and belonging to the messuage"; and on p. 428 of the same work it is said that "mease or messuage seems to come from the French word maison or mansion, which is no other but a place of abiding or habitation. And yet messuage in our law contains more than the very place of habitation: for a house and a messuage differ, in that a house cannot be intended other than the matter of building; but a messuage shall be said all the mansion-place, and the curtelage shall be taken as parcel of the messuage, 20 H. 7. Keloway, fol. 57a. And by the name of a messuage the garden and curtelage shall pass, Plowden, fol. 171a." So "by the grant of a messuage, or house, messuagium, the orchard, garden, and curtilage doe pass; and so an acre or more may passe by the name of a house": Co. Litt. 5b; and "'House,' mese, or maison called in legall Latine messuagium, containeth (as hath been said) the buildings, curtelage, orchard, and garden": Co. Litt. 5b, 56b.

(1) (1604) Cro. Jac. 25.
(2) (1795) Ridg. L. & S. 390, at p. 410.
(3) (1812) 15 East,
(4) (1852) 3 H. L. C. 638, at p. 686.
(5) [1891] A. C. 531, at p. 580.
(6) (1847) 16 M. & W. 307, at p. 309.

In *Hill* v. *Grange* (1) Brown and Saunders JJ. held that a garden and curtilage are parcel of a messuage. *Bettisworth's Case* (2), *Carden* v. *Tuck* (3), *Patrick* v. *Lowre* (4), *Emerton* v. *Selby* (5), *Blackborn* v. *Edgley* (6), *Scholes* v. *Hargreaves* (7), and *Smith* v. *Martin* (8) are to the same effect. This being the meaning of messuage, when the Legislature speaks of estovers or a right to fuel wood as appurtenant to a messuage, it must be taken to intend a right appurtenant to the house and to the curtilage and garden belonging to the house. The report of the Commissioners cannot be looked at for the purpose of construing the Acts of 1851 and 1854, which must speak for themselves: *In re the Dean of York* (9); *Salkeld* v. *Johnson* (10); *Farley* v. *Bonham* (11); *Martin* v. *Hemming* (12); *Arding* v. *Bonner* (13); *Ewart* v. *Williams* (14); *Trustees of Clyde Navigation* v. *Laird.* (15) It follows that if the house, part of the messuage to which a right of estovers is made appurtenant by statute, falls or is destroyed, and another house is erected within the same garden or curtilage which belonged to the fallen house, the right is not lost, but continues appurtenant to the old messuage including the new house. That is what has happened in this case.

If there was any difference between the right of the commoners before and after these Acts, the title at common law is now merged in and extinguished by the statutory right: *Taylor* v. *New Windsor Corporation* (16); *Mayor, &c., of Manchester* v. *Lyons.* (17) But in truth for the purposes of the present case there is no material difference. At common law turbary and estovers might be either (1.) appurtenant to a messuage or (2.) in gross. Even at common law a grant of estovers appurtenant to land might be made by the Crown in derogation of its forestal

(1) (1555) Plowd. 164, at p. 171.
(2) (1580) 2 Rep. 31a.
(3) (1588) Cro. Eliz. 89.
(4) (1611) 2 Brownl. 101.
(5) (1703) 2 Ld. Raym. 1015.
(6) (1719) 1 P. Wms. 600, at p. 603.
(7) (1792) 5 T. R. 46.
(8) (1673) 2 Wms. Saund. 400.
(9) (1841) 2 Q. B. 1, at p. 34.
(10) (1846) 2 C. B. 749, at pp. 756, 757.
(11) (1861) 2 J. & H. 177.
(12) (1854) 24 L. J. (Ex.) 3, at p. 5.
(13) (1856) 2 Jur. (N.S.) 763.
(14) (1854) 3 Drew. 21.
(15) (1883) 8 App. Cas. 658, at p. 673.
(16) [1898] 1 Q. B. 186.
(17) (1882) 22 Ch. D. 287.

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rights, and such a grant would be construed favourably to the grantee and strictly against the Crown: *Willingale* v. *Maitland*. (1) But assuming that the present rights were appurtenant to this messuage in the strictest sense of being appurtenant to the old house and nothing else; even then it is not correct to say that when the ancient house was pulled down the rights were lost; at the most they were suspended until the new house was built. The new house need not be built upon the old foundations. In *Costard and Wingfield's Case* (2), in the report in Godbolt it is stated that "they"—i.e., the judges—"did all allow that he who new builds an old chimney shall have estovers, so a house common. So if a house fall down, and the tenant build it up again in another place." This has been frequently followed by more modern writers: Tudor's Leading Cases on Real Property, 4th ed. (1898), p. 714, in notes to *Tyrringham's Case* (3); Woolrych on Commons, 2nd ed. (1850), p. 83; Shelford's Real Property Statutes, 7th ed. (1863), p. 52; Carson's Real Property Statutes, 2nd ed. (1910), p. 43. Where, as in *Cowper* v. *Andrews* (4) and *Bryers* v. *Lake* (5), it is said that if the commoner rebuild his house "in the same place" he shall have his estovers again, what is meant is "within the same curtilage and on or near the same site." So when in *Luttrel's Case* (6) it is said that the new building "ought to be upon the same place which was the old foundation of the old house," all that is meant is that if this is done the right will be more easily established in the future, should it come in question. The true test is that indicated in the next sentence, namely, whether the new house is "in a manner a continuance of the old house," or "supplies the place" of the old house, in the words of Lord Hatherley L.C. in *Warrick* v. *Queen's College, Oxford* (7), or is "in substitution for" the old house, in those of Kelly C.B. in *Lord Rivers* v. *Adams* (8): if it is, the right to estovers remains; and whether it is or is not is a question of fact depending mostly on the intention of the person in destroying the old and

(1) (1866) L. R. 3 Eq. 103.
(2) (1586) Godbolt, 96.
(3) 4 Rep. 36a, 36b.
(4) Hob. 39, 40.
(5) Sty. 446.
(6) 4 Rep. 86a, at p. 87b.
(7) L. R. 6 Ch. 716, at p. 730.
(8) (1878) 3 Ex. D. 361, at p. 370.

rebuilding the new house: *Moore* v. *Rawson*. (1) In the case of estovers the house is merely the standard by which the extent of the right is measured, and the loss of the measure does not involve the loss of the right: *Hayward* v. *Cunnington* (2); *Carr* v. *Lambert*. (3) The argument of the Attorney-General in *Arlett* v. *Ellis* (4) is not of authority to bind this Court; and even if it were, it would not be in point, because that case differs substantially in its facts from the present.

As regards the right to fuel wood, the position of the defendant is even stronger if this right can be regarded as a right in gross. It has indeed been said that estovers cannot exist in gross, because they are necessarily attached to a particular house and tenement, and must be expended there: Year Book Mich. 5 Hen. 7, f. 7 B, pl. 15; Vin. Abr., tit. Common O., p. 595, pl. 4. The right cannot, it is true, be severed from a particular house when the necessities of that house form the standard of measurement for the common, for the next grantee of the privilege might require more fuel for a larger house, or more wood for repairs than before, and so the owner of the waste would be unjustly prejudiced. But when the amount of wood to be taken is already ascertained, so that neither the commoner nor his grantee could take more than a certain number of trees, faggots, or cartloads of wood, there is no reason why the common should not become a right in gross: Elton on Commons, pp. 86, 87, 101; Cooke on Inclosures, p. 37; Williams, Rights of Common, p. 199; *Danie* v. *Hanslip*. (5) In Woolrych on Commons, 1st ed., p. 93, it is said that "It was very early decided that profits granted out of a waste could not be sold," citing the Year Book Hil. 17 Edw. 3, f. 7, pl. 21, "and this doctrine has since been adhered to . . . . So it was laid down for law that common of estovers, being used in a house, could not be common in gross," citing the Year Book Mich. 5 Hen. 7, f. 7 B. To this there is a note added: "However, if there be, as may be the case, a grant of estovers certain appurtenant, it seems that such a common being defined, may

(1) (1824) 3 B. & C. 332; 5 D. & R. 234.
(2) (1669) 1 Lev. 231.
(3) (1866) L. R. 1 Ex. 168.
(4) 9 B. & C. 671.
(5) (1673) 2 Lev. 67.

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be granted over." In *Drury* v. *Kent* (1) the case was that a man prescribed to have common appurtenant to the manor of B. for all his beasts levant and couchant upon it; he granted this common to A. Whether this grant were good or no was the question. And "adjudged, that he could not grant it over, for he hath it quasi sub modo, namely, for the beasts levant and couchant; no more than estovers to be burnt in a house certain; but common appurtenant for beasts certain may be granted over. Wherefore it was adjudged ut supra." *Bunn* v. *Channen* (2) is to the same effect. In the present case the extent of the right has been definitely fixed by the register as one load of good fuel wood yearly. Appurtenancy to a tenement being unnecessary as a measure of the right may be ignored, and the right may be taken for what it is in substance, a right in gross. If so, the pulling down of the old house is immaterial. The right remains as it was granted by the Legislature.

*Austen-Cartmell* in reply. As to the meaning of "messuage," not much assistance can be derived from the old authorities, which shew that it was used in either sense: *Hill* v. *Grange* (3); *Bishop of Chichester and Strodwick's Case* (4); *Doe* d. *Clements* v. *Collins* (5); *Scholes* v. *Hargreaves* (6); *Benson* v. *Chester* (7); *Fenn* v. *Grafton*. (8) In modern times "messuage or dwelling-house" has been held to include a flat or suite of apartments: *Rogers* v. *Hoesgood*. (9)

There is in fact no instance of estovers originally appurtenant to a house having become a right in gross; but that point is immaterial, because in the present case the register, which has the force of a statute, declares that the turbary is "for the necessary fuel of the said messuages to be therein burnt and expended," and that the fuel wood is "as reasonable and necessary estovers for the necessary firewood of the messuages . . . . to be burnt and expended therein." These rights being fixed and ascertained by statute must rest within the limits

(1) (1603) Cro. Jac. 14.
(2) (1813) 5 Taunt. 244.
(3) Plowd. 164.
(4) Godbolt, 234.
(5) (1788) 2 T. R. 498.
(6) 5 T. R. 46.
(7) (1799) 8 T. R. 396.
(8) (1836) 2 Bing. N. C. 617.
(9) [1900] 2 Ch. 388.

and confines prescribed by the statute. They are appurtenant to a particular structure; when that structure ceases to exist the rights cease also.

But assuming that these rights retain the incidents which they would have at common law and survive to any house built as a continuance of or in succession to or substitution for the ancient house, the question is, when is a new house a continuance of an ancient house? Not every house built to replace an ancient house is built as a continuance of it. To be a continuance of the ancient house the new house must be built upon the foundations of the ancient house. The passages cited on behalf of the defendant from Tudor's Leading Cases on Real Property, Woolrych on Commons, Shelford's Real Property Statutes, and Carson's Real Property Statutes, are all based upon the authority of Godbolt's report of *Costard and Wingfield's Case*. (1) That report omits the passage which appears in the report in 2 Leonard (2), "and so if he build a new house upon the foundation of an old house." The authority of Leonard as a reporter stands higher than that of Godbolt: North's Discourse on the Study of the Laws, p. 24; Wallace on the Reporters, pp. 99, 149; Marvin's Legal Bibliography, pp. 339, 459.

[HAMILTON J. If an ancient house were raised from its foundations and removed to a new site close by, would all rights appurtenant to the ancient house cease and determine?]

Yes; because they were appurtenant to the most perdurable part of the house, that is to say, the land on which it stood: *Luttrel's Case*. (3)

March 1. HAMILTON J. This is an information filed by the Attorney-General on behalf of His Majesty against Arthur Sutherland Reynolds, alleging that he converted to his own use certain fuel wood in unenclosed parts of the New Forest of which His Majesty is in right of his Crown seised in his demesne as of fee. It also alleges that A. S. Reynolds claims as of right to be entitled to common of turbary and to one load of fuel wood

(1) Godbolt, 96. (2) 2 Leon. 44.

(3) 4 Rep. 87b.

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annually from the open and unenclosed parts of the said forest under a claim No. 1098 in the register of the rights of common held in and over the forest, whereas, by reason of his having pulled down and altogether removed the ancient messuage appurtenant to which these rights had been held, they had wholly ceased and determined. Since the proceedings commenced A. S. Reynolds has died, and his executors have sold the property in connection with which the dispute arises; but the action has been revived, and the executors now defend it and assert a claim to the common of turbary and to the load of fuel wood mentioned in the information.

The claim to common of turbary stands for all practical purposes on the same footing as the claim to one load of fuel wood annually. I think the only points of difference are these: that common of turbary is named in the statute of 1854 under which the register was provided for; that the right itself is one of even less value than the right to the load of fuel wood—not one in ten of the persons entitled to common of turbary in the forest exercises the right, and the right has not for a long time been exercised in respect of the premises in question; and I have no evidence that it ever was exercised for or could usefully be applied to any purpose except that of fuel, and as fuel it is of the lowest possible value. The only point of practical difference between it and the right to fuel wood is that under the practice of the forest the fuel wood is cut and corded by the foresters and the officials of the forest, while the turves are cut under regulations prescribed by the officials of the forest and are cut and carried by the commoners themselves. As far as the right of fuel is concerned, it appears to be of no disadvantage whatever to the Crown and the public except for the trivial value of the fuel wood which must be cut in any case. As regards the common of turbary, it is possible that this right by which the commoners cut the turves themselves might be prejudicial to the maintenance of the forest as open ancient woodland, and thus and so far prejudicial to the public interest.

Both parties to this action carry on the proceedings much more by reason of the general importance of the question than of its importance in this particular case, in which the rights

in question are of insignificant value; but it often happens that claims which demand least money involve most law, and in this case a question has been raised which seems to have been undecided down to the present time.

I find the facts to be as follows: In 1905 the then owners of a property called Yew Tree Farm at Cadnam in Hampshire sold it to the late A. S. Reynolds. That property included the area numbered on the tithe map of that parish in 1842 as No. 669. It therefore included the house in question. That house was an old one. It must have been old in 1800, otherwise it could not have been made the subject of these rights in the register. Part of it—the back part—was older than the front, and was a half-timbered structure; its age is unknown. For as much as twelve or thirteen years before 1895 the house had been uninhabited, and uninhabitable. A labourer named Gold, who last lived in it, had left it because it was no longer fit to dwell in, and one witness, who knew it just before it was pulled down, said that it was so dilapidated that he thought it would be dangerous to be inside it in a high wind. I would mention here incidentally that immediately before the purchase by A. S. Reynolds a family named Bradford had owned this house. Bradford himself kept a neighbouring public-house called the "Sir John Barleycorn," and the fuel ticket, or authority to receive a portion of the fuel of the forest, had been issued to him in due course by the officials of the forest. He did not consume this fuel in the building in question; he consumed it in the neighbouring inn where he lived. In doing that he was unquestionably doing what was wrong, because it is laid down in Manwood's Law of the Forest, 4th ed., p. 133, that "a man may have estovers"—and these were estovers—"as appurtenant to a house," (it is common ground that these were appurtenant to this dilapidated house, though whether to something else as well is in question,) "and in such case if the estovers are spent in any other house, 'tis a good cause of seizure." But this is a matter of slight importance; the only relevance of it is that, as it only came to the knowledge of the deputy surveyor during the hearing of this case, the admission which has been made, that down to the purchase by A. S. Reynolds all the rights were fully subsisting, must be

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taken subject to the reservation of any right the Crown might have in a similar case to assert its rights against any person who, being entitled to fuel, consumed the same in a house other than that to which the right was appurtenant.

The purchase of this property by A. S. Reynolds was part of a larger scheme. The particular area of land mentioned in the plot No. 669 on the tithe map contains a little less than two acres. He purchased adjoining land to a considerably greater extent, and with the assistance of a Colonel Roberts, an architect who had formerly been a surveyor for the forest, built a new and considerable mansion house, near to, but not on any part of, plot 669, and threw plot 669 into the garden and grounds so as to make it all one residential property. The site of this ancient and dilapidated house was cleared before any new building was erected of the same character or in the immediate neighbourhood. Colonel Roberts seems to have believed, and advised his client, that the right of fuel enjoyed in connection with the house could be preserved and enjoyed in another house, if the hearthstones of the old house were left in situ; and accordingly pains were taken, and successfully taken, to assemble the hearthstones (I think there were four in the old house) and replace them on the exact spot they had formerly occupied. It was at first intended to put a sundial on the hearthstones, but that intention was abandoned, and the sundial was placed elsewhere. Then on a spot a little way off a new house was erected containing one hearth and one hearth only, and it is admitted that the hearth and chimney in the new house were of such dimensions that they would not be capable of consuming more fuel than the hearth or hearths in the old house. The reliance that is now placed upon the preservation of the old hearthstone is simply as evidence that there was no intention to abandon the ancient right. The view of Colonel Roberts, which appears to me to be somewhat superstitious and to attach an almost pagan importance to a hearth, was not pressed, and it is not contended that the ancient hearthstone was symbolically the ancient house; but its restoration is quite properly relied upon as evidence that there was no intention to abandon the rights; and applying the tests which are suggested in the case of *Moore* v.

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*Rawson* (1), I find as a fact that, so far from intending to abandon them, A. S. Reynolds by his acts proved his intention of preserving the rights. At the same time it was well known to those who arranged the new building that it was not re-erected on the actual site formerly occupied by the old building. The new building is one of which plans and elevations and photographs inside and out have been put before me, and the first question upon it is whether it is a dwelling-house. I am satisfied that it is a dwelling-house. It is not necessary, in my opinion, that it should have been hitherto used as a dwelling-house, or that it should have been intended to be permanently used as a dwelling-house. I do not think pernoctation, actual or regular, is essential. It was a dwelling-house, whenever it was desired to use it as such; it had a hearth and a good chimney, and windows and doors and an earth closet, and a second room which, though at present used for spades and barrows, could well be used as a second living room, and there is to my mind no doubt, not only that it might be, but that it would be, from time to time, used as a dwelling-house. Although there is no direct evidence upon the point it is legitimate to infer that those who designed this building intended it to be a dwelling-house at times and in case of need. On the other hand I think it is perfectly clear that the original site, as a site for a building, was abandoned. First of all the original site was cleared before any new building was put up; secondly, even before this information was filed A. S. Reynolds had commenced an action in the Chancery Division claiming his right to the fuel in respect of the new building. That action has been transferred, so that it may stand or fall by the issue of the present case; but in the present case the claim in respect of the new building has been advisedly maintained. Furthermore, to have re-erected the old cottage on the old site would have spoilt the view from one of the chief windows. I am quite satisfied that under no circumstances would A. S. Reynolds have spoilt his view for the sake of a load of wood. For these reasons I have come to the conclusion that there was an intention permanently to abandon the old site as a site for any new building.

(1) 3 B. & C. 332.

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The remaining point turns upon the exact position of this new building. It is common ground that no part of the new building is upon the precise site which was occupied by the old one, and that, as actually erected, it was set back somewhat further from the old site than had been originally intended. It is also common ground that it is erected in what used to be called the orchard, where when the work was done there were still a few old fruit trees. Four maps have been admitted as evidence, the tithe map of 1842, and three ordnance maps of 1868, 1897, and 1907. The three ordnance maps shew various sub-divisions of the 1 acre 35 perches, which was the area of No. 669 on the tithe map. According to the ordnance map of 1907, the new building stands to the north of a line laid down in the ordnance map of 1897 as a boundary of some sort between the open ground immediately surrounding the old cottage and the limited ground in which the old fruit trees are. I find on the evidence that the new building is north of the line of the old hedge as shewn in the ordnance map of 1897, the front being just on or within the line of the remains of that old hedge. The bulk of the new house is thus in the orchard north of the line of that old hedge. The hearth in the new building is altogether within the old orchard.

When the forest officials became aware that the old house had been pulled down, though they had prepared the usual fuel ticket for 1906, and had issued the fuel ticket for 1905, they cancelled the fuel ticket of 1906 and claimed that the alteration in the site was conclusive to destroy the ancient right. Hence these proceedings.

One other matter appears to be worth mentioning: this particular property, Yew Tree Farm, is within the ambit of the perambulation of the forest of 8 Edward I. Every perambulation of the forest since then has been much more restricted, and ever since 8 Edward I. Yew Tree Farm has not been within the perambulation of the forest. The subsequent perambulations were, in 21 Edward I., in 22 Charles II., and three in the last century, 1800, 1815, and 1839; and in 1789 an elaborate map was prepared on the basis of the perambulation then in force, which shews that this place is

outside the area of the forest. It never was, so far as is known, any part of the waste of the forest.

The question in the case is this: When Colonel Roberts advised A. S. Reynolds to pull down the old house and to build a new one in a different place, did he make a mistake or not in believing that the rights which he desired to preserve would remain unaffected? Did the pulling down of the old house destroy the rights, or do they survive?

The rights in question are rights of common appurtenant and therefore rest in grant; and as it is not contended that anything has been done to convert them into rights in gross, if such a thing were possible, they are rights appurtenant still, and appurtenant therefore to some messuage. As to the right to fuel wood it is significant that in the register this right is not called a right of estovers, but a right to a load of fuel wood. If one refers to such ancient and elementary authorities as Cowell's Law Dictionary, titles "Estovers" and "Alimony," one finds that the term "estovers" is used in a very wide sense indeed; and I think the use of the words "fuel wood" is intentionally and successfully used to indicate that the right in question is not generally to wood for the various purposes for which common of estovers may exist, but it is for the purpose of fuel and fuel only.

The first question to consider is the substance and effect of what was done in 1854 and 1857. The old rights of the commoners to gather fuel had been preserved by statute down to the last century. For example, in the statute 9 Will. 3, c. 33 (1), s. 9, there was a proviso, under the provisions made to punish those who broke down nurseries of wood and timber in the forest, which saved "unto the several adjacent inhabitants, their ancient right of fuel, provided that such inhabitants do not sell or otherwise dispose of any part thereof . . . ." By 1850 it is manifest that the complexity and uncertainty of the various claims were a source of great inconvenience in the forest in respect of its management and otherwise. By 14 & 15 Vict. c. 76 a legislative provision was made for ascertaining and registering all the claims made to various rights in the forest;

(1) This is c. 36 in the common printed editions.

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s. 10 of that Act recites that "Whereas divers of Her Majesty's subjects claim common of pasture, common of turbary, and common of estovers, and certain rights of pannage, and to dig gravel, sand, and marl, and cut fern, heath, and furze, in and upon the New Forest: And whereas great doubt and uncertainty exists as to the extent of the said rights or claims, and as to the persons entitled to exercise the same: And whereas it is expedient to provide for a due registration of the said rights and of the persons so entitled, and an easy and economical mode of adjudicating upon and finally settling all such claims:" and then provides that the Commissioners of Woods and Forests are to give notice requiring all persons claiming rights to deliver their claims in writing to the verderers. By s. 15 of the Act every claim not so preferred was to be absolutely barred. Claims could be objected to, and the judge of the county court of Southampton was appointed to adjudicate upon these claims. I should infer that so many claims were preferred and objected to, that the county court of Southampton would have come to a standstill if the county court judge alone had decided them all (1): at any rate, by the statute 17 & 18 Vict. c. 49, a separate commission was appointed—consisting of three persons, among whom was that learned judge, the late Mr. Gale, the author of the well-known work on Easements—which was finally to deal with this matter. It recites the Acts 14 & 15 Vict. c. 76, 15 & 16 Vict. c. 62, and 16 & 17 Vict. c. 19, and proceeds "Whereas in pursuance of the provisions of the said Acts, certain of the said claims have been objected to:" (the objections were apparently taken on behalf of the Crown alone) "And whereas the validity or invalidity of large classes of the said claims depends on the settlement of certain disputed points as to the existence or nature of the rights preferred by such claims, and it is expedient that Commissioners should be appointed for the purpose of deciding on the claims in manner hereinafter mentioned, and to make provision for the speedy trial of certain of the said claims before the whole objections shall be delivered, to afford an opportunity to claimants to withdraw their claims and prefer

(1) The number seems to have exceeded 1200. See the recital to 17 & 18 Vict. c. 49.

amended claims in lieu thereof, and to make such other provisions with regard to claims and objections, and the hearing and determining the same, as hereinafter provided." Then s. 5 provides that all claims not objected to were to be allowed by the Commissioners. By s. 7 the Commissioners could allow or disallow any claim, in whole or in part, or amend it in whole or in part. Sect. 11 provided that "All rights of common claimed and allowed shall go and be held with the lands or hereditaments in respect of which the same are claimed and allowed, and as appurtenant thereto." Then by s. 24, the claims when decided on and determined were to be entered in a register, which was to be final and binding on all parties, and for all purposes the evidence of title to the rights claimed and allowed. Finally, s. 28 provided as follows: "All claims made or which shall be made under the provisions of the said Acts or this Act of rights of common of pasture, pannage, or turbary, which shall be proved to the satisfaction of the Commissioners to have been enjoyed or exercised as of right, without interruption, by the claimant or persons through or under whom he claims, as from any time in the year one thousand eight hundred, shall be allowed by the Commissioners; but such rights shall be held and enjoyed according to the laws and assize of the said forest, and such rights of common of pasture shall be enjoyed and allowed only in respect of the cattle of the claimant levant and couchant on the lands in respect of which the claim is made; and no claim of common of turbary shall be allowed other than in respect of a messuage erected in or prior to the year one thousand eight hundred; and such turbary shall be allowed only for the necessary fuel of such messuage, to be therein burnt and expended as belonging and appertaining to such messuage." As the result of the statutory power so given, the three Commissioners in 1857 compiled the register, prefixing thereto certain recitals to save the adding them to each separate entry in the register, and their entry No. 1098 is the entry of the claim in question. The claimant was William Mansbridge, farmer, a predecessor in title of A. S. Reynolds; the rights allowed are common of turbary and one load of fuel wood; and the lands or tenements in respect of which his claim has been allowed are; An ancient messuage, situate in

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the parish of Minesteed, in the county of Southampton, and numbered on the tithe map of that parish 669. There are also common of pasture and common of mast claimed in respect of 20a. 0r. 30p. of land situate at Minesteed aforesaid and numbered on the said tithe map with various numbers, including 669, paying yearly $5\frac{1}{2}d.$ and one bushel of oats.

What is the effect of that entry in the register in view of the Act of 1854? The defendants from the first, and the Crown latterly, have contended that it amounts to a grant de novo of this right of common free from any incidents attached by the general law as to rights of common, and that it is now the root and the only root of title to the right claimed. Agreeing in that, they arrive at contrary conclusions by interpreting the words "ancient messuage" in opposite senses. The Crown contends that there is a new grant to an ancient messuage, unattended by any right which the common law might give to transfer it to a new messuage, and that the ancient messuage having been pulled down the right has ceased to exist. The defendant contends that there is a new grant of these rights appurtenant to an ancient messuage, namely, the area numbered on the tithe map 669 of 1 acre 35 perches; that the new building is inside that messuage; the house is not ancient, but the messuage is as ancient as the world itself; therefore, he concludes, he brings himself within the terms of the grant, and the right remains. I fear that neither of these short cuts leads to the conclusion of this case.

If this Act of Parliament, in the language of Lord Davey in *New Windsor Corporation* v. *Taylor* (1), according to its true construction embraced and confirmed a right which had previously existed by custom or prescription, so that the right became thenceforward a statutory right, and the lower title by custom or prescription was merged in and extinguished by the higher title derived from the Act of Parliament—if I thought the root of title was in the Act of Parliament and no longer rested upon anything else—I should of course conclude that the Act of 1854 got rid of all questions prior to that date, and that its effect must be judged entirely from its words and from that

(1) [1899] A. C. 41, at pp. 49, 50.

which is validly done under it. But it appears to me to have a different intention and effect. It is similar in its nature to the Act discussed in *Attorney-General* v. *Gauntlett.* (1) It is an Act providing for the settlement of disputed claims; for the allowance of such of them as can be proved to exist, subject to rights of amendment which are to be judicially exercised; and for a means of proving the existence of the rights in the future, so that not the Act but the register will be the exclusive evidence of title to the rights claimed and allowed by the Commissioners as theretofore existing. The Commissioners had very wide powers; they could take any evidence they thought fit, and their decision was final; but it was to be a judicial decision. They had no power to make a new grant not resting upon what they were satisfied was a pre-existent claim of right. The whole object of the statute is to provide a convenient tribunal of exceptional powers for the determination of ancient claims of right and their due allowance as upon their ancient foundations.

If that is so, the Commissioners were bound to allow the rights as appurtenant to lands or hereditaments, and when they had done so, then the rights would go and be held with the lands or hereditaments. The distinction therefore of lands, and hereditaments other than lands, to which the rights might be appurtenant, is in the statute itself. Further, although in s. 28 of the Act of 1854 estovers and rights of fuel are not mentioned, common of turbary is. And in the earlier Act, 14 & 15 Vict. c. 76, to which this present Act makes reference, there had been express allusion to common of estovers, including, of course, claims to fuel rights. Either, therefore, the express words of s. 28, when they deal with common of turbary, prescribed the conditions on which the Commissioners were to allow such rights, or else the general words of the statutes give the Commissioners power to allow those rights in so far as their limits are not prescribed. In the comprehensive findings of their allowances prefixed to the register, the Commissioners declare, as applicable to each entry severally, that "every allowance of fuel and fuel wood is an allowance of the quantity described of good fuel wood yearly from the open and unenclosed parts of the said forest by the view and allowance

(1) (1829) 3 Y. & J. 93.

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of the foresters of the said forest as reasonable and necessary estovers for the necessary firewood of the messuages mentioned and described in this our register, to be burnt and expended therein." Quacunque via, therefore, I think that the definition of the right is now to be found in the entry 1098 in the register.

It was strenuously contended that the word "messuage" has a specific legal meaning, that its mention alike in s. 28 of the Act of 1854 and in the register compels me to attach to it that specific meaning, and that the specific meaning is, not only a house and the land on which it stands, but the customable parcel of land in which the house stands, and which is in fact enjoyed therewith; and hence it is said I must interpret "messuage" sufficiently widely to cover the whole of plot 669 on the tithe map, and therefore to cover the site of the new building, and therefore to cover the claim as now made by the defendant. As a matter of construction of s. 28 of the Act of 1854, I think that, when in one part of a sentence seven lines long the Legislature uses the word "messuage" three times over, it intends to use the word "messuage" in the same sense each time, and when it speaks of "a messuage erected prior to the year 1800," I am unable to understand what that can refer to except a house; and therefore the right of turbary appertains to the house existing before 1800. The words of the Commissioners must have the same construction. I do not understand what meaning can be attached to fuel wood "for necessary firewood of the messuages to be burnt or expended therein," unless messuage here means a house. However, this was learnedly argued, and I think that I ought to refer to the authorities that were cited.

Doubtless the word "messuage" is used in divers senses. Sometimes it is used as meaning a house and not any land held with it; sometimes it is used in a wider sense; it may at various times have had prima facie the less limited sense; but in the authorities that have been referred to it is quite clear that in ancient times it has been used in both senses. First, Termes de la Ley was cited, title "Curtilage," at p. 208 of the edition of 1721, and title "Mease" at p. 439. Sheppard's Touchstone was cited also, the seventh edition, p. 94, and the ancient learning that is collected in Williams' Notes on Saunders'

Reports—the note to *Smith* v. *Martin* (1); but the various decisions, as well as the very passages mentioned, make it clear that "messuage" has no fixed and invariable meaning. In Sheppard's Touchstone the commencement of the passage is: "By the grant of a messuage, or a messuage with the appurtenances, doth pass," &c., which, of course, deprives this as a matter of interpretation of any precision. It is true that sometimes a feoffment of a cottage will include the garden, as was agreed in *Carden* v. *Tuck* (2), and it may be that, as in the case of *Emerton* v. *Selby* (3), where a cottage is mentioned, a curtilage will be presumed; but two of the cases cited themselves use the word "messuage" as clearly referring to a house; one is the *Bishop of Chichester and Strodwick's Case* (4), in which the defendant claimed to have the branches of trees for necessary estovers to be burnt in necessario focali in terris et tenementis, and it is said at the end of the report that because the defendant alleged the custom to be to have the same as estovers to be burnt in terris, and gave evidence only as to the messuage, it was found against the defendant, for that the evidence did not maintain the issue. The other is the case of *Benson* v. *Chester* (5), where Lord Kenyon, no mean authority on such a point, and not a judge likely to use language inaccurately, said: "It is contended however, on the part of the defendant, that the owner of a messuage only within this district, or the owner of a messuage with only a square yard of land annexed to it, may collect as many cattle as he can from all parts of the kingdom, and stock them on his common: but such a right of common cannot in law exist." In the case of *Scholes* v. *Hargreaves* (6) again Lord Kenyon C.J. with Buller and Grose JJ. dismissed a claim for common for cattle levant and couchant as appurtenant to a messuage, when it appeared that the "messuage" was in fact a butcher's shop with "a mere hole under the shop window." Buller J. in his judgment referred to *Emerton* v. *Selby* (3), one of the cases relied upon by Mr. Danckwerts, and said that to lay it down that common cannot be claimed for cattle levant and couchant on a messuage

(1) 2 Wms. Saund. 400.
(2) Cro. Eliz. 89.
(3) 2 Ld. Raym. 1015.
(4) Godbolt, 234.
(5) 8 T. R. 396.
(6) 5 T. R. 46.

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is right, if by "messuage" is meant only a house. There is nothing whatever to shew that "messuage" is to be read of necessity in any extended sense either in the Act or in the register.

How is the word in fact used by the Commissioners? An exhaustive examination has been made of the register as well as of the cases bearing upon this point by the industry of counsel, of which I have had ample proof and for which I am deeply grateful; as the result of this examination two things appear—first, that with two exceptions the fuel rights are always attached or attachable to a messuage in the sense of a house; and, secondly, that the reference to the number in the tithe map is not a reference for the purpose of extending the term "messuage" and providing the bounds, but for the purpose of identifying the house by its position on a map which existed or ought to exist in every parish. [The learned judge cited numerous instances in support of these conclusions, and proceeded:—] In No. 1098 the ancient messuage was undoubtedly the house.

This introduces a new question of law. It is said that the old house is really immaterial; that it was never anything but a measure of the right to be enjoyed; that the only reason for insisting on the old house is to prevent an undue burden on the owner of the soil; and that as soon as the Commissioners fixed the allowance at one load, all need for measurement ceased. Therefore, it is said, there was no further materiality in the identity or the age of the houses, and, consequently, there is no reason why this right should not attach to the new building, since that can do nobody any harm; the rights of the commoners ought to be favourably viewed by the Court and interpreted so as to support them as against the Crown. That proposition I need not discuss, because it appears to me that although the Courts have supported the rights of commoners, especially in forests, as against the Crown, this has been done for the purpose not of extending but of supporting and legalizing rights actually enjoyed. I do not think, when the right is clearly appurtenant to a house, that the identity of the house can be treated as a mere formality or irrelevancy. The appurtenancy to a house is much more than a question of measure. The needs of the house or its inhabitants

no doubt served as a measure before the quantity was fixed, just as levancy and couchancy are the measure of rights of pasture in respect of land. But to give no further force to the term "appurtenant" would almost reduce the term to insignificance, and would be contrary to all the authorities. It was contended that the utmost effect of moving the house is that the right has become a right in gross and appurtenant no longer, though it was admitted that no act had been formally done with the intention of converting the right appurtenant into a right in gross. Whether it be possible to convert a right appurtenant, such as this is, into a right in gross is a question which, though much discussed, I need not decide. There are passages in Cooke on Inclosures, Elton on Commons, and Woolrych on Commons which seem to keep the matter open. There seems to be a clear preponderance of opinion to the contrary; but in any case it is immaterial here, because the words in the statute in the case of common of turbary and the words of the Commissioners in the case of common of estovers have definitely decided that the right is appurtenant. I must, therefore, decide that this right is appurtenant. Appurtenant to what? It seems to me it must be appurtenant to the ancient house, or to any substitute which, according to the rules of common law, would continue to enjoy the same appurtenant rights.

As regards this, I must refer to some of the numerous authorities cited. For very long the whole current of authorities has treated such a right of fuel as this as appurtenant to a building. There is in the Year Book of Edward III. in the year 1340 (1) a case of trespass brought by the Bishop of Chichester in which language somewhat to the contrary is used, because it is there said "When you claim this profit as in the nature of reasonable estovers you ought to show that it can be so, but you have not claimed it as for firewood, or for building, or for enclosing, in which case reasonable estovers appendant to this land would of their nature be consumed on the freehold itself to which they are appendant, just as beasts which till land shall feed in the place where one has common appendant to the particular land"; but from

(1) Mich. 14 Edw. 3, pl. 38 (Rolls Series).

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the sixteenth century onwards it appears always to have been treated as appurtenant, and appurtenant to a building. It is said in *Tyrringham's Case* (1) that "common of turbary cannot be appendant to land, but to an house . . . . for the thing which is appendant ought to agree with the nature and quality of the thing to which it is appendant, and turves are to be spent in an house; . . . . a leet cannot be appendant to a church or chapel, for they are of several natures." *Sir Henry Nevil's Case* (2) is to the same effect. The *Bishop of Chichester's Case* (3), which I have referred to before, appears upon examination to proceed upon the view that estovers cannot be appertaining to lands, but to houses only. There is the case of *Valentine* v. *Penny* (4), where it is said a common appertaining to a house ought to be spent in the house and not sold abroad; and modern authorities are to the same effect. In *Warrick* v. *Queen's College, Oxford* (5), Lord Hatherley in a considered judgment says: "An ancient right of turbary can only exist as being a right in respect of an ancient dwelling house or building, or, at the most, for the house which supplies the place of that house"—a quotation which I shall have to refer to again. Sir George Jessel in *Baylis* v. *Tyssen-Amhurst* (6) says "that where the right is annexed to other lands"—in this case it was a claim of pasture—"the right must have some connection with those other lands to make it what is called appurtenant; that is, there must be some relation between the enjoyment of the right and the enjoyment of those other lands"; and then he says further, "I cannot find here the nature of the appurtenancy stated. It is stated to be appurtenant. I think the nature of the appurtenancy must be stated. Then, in the next place, it is said that these lammas lands lie 'as open and common pasture for the cattle of the owners of lands and tenements in the parish, and of their respective occupiers as hereinafter mentioned.' Now 'owners of lands and tenements,' I think, must be restricted to 'owners of lands.' I do not understand the right being appurtenant to a church

(1) 4 Rep. 36a, at p. 37a.
(2) Plowd. 377, at p. 381.
(3) Godbolt, 234, pl. 326.
(4) Noy, 145.
(5) L. R. 6 Ch. 716, at p. 730.
(6) 6 Ch. D. at pp. 507, 508.

steeple. I think it must mean land, and nothing else." The text-books of authority are to the like effect. In Fitzherbert, Natura Brevium, at p. 180 H, it is said: "If a man have common of estovers by grant, he cannot build new houses to have common of estovers for those houses;"—which is inconsistent with his being entitled in respect of his land to enjoy the estovers in any house that he may build upon that land. Coke upon Littleton, p. 121b, says: "Common of turbary or of estovers cannot be appendant or appurtenant to land, but to a house to be spent there . . . ." repeating what was said in *Tyrringham's Case*. (1)

An argument was advanced upon that, which I must shortly deal with. It was asked what incongruity is there between these estovers and the land to which they are said to be appurtenant? What is the meaning of Coke's doctrine which says (2) that things incorporeal which lie in grant, as advowsons, villeins, commons, and the like, may be appendant to things corporeal, as a manor house or lands; or things corporeal to things incorporeal, as lands to an office; but yet they must agree in nature and quality, for common of estovers cannot be appendant or appurtenant to land, but to a house to be spent there? The case of *Hayes* v. *Bridges*, in the Irish Term Reports (3), was referred to, where it is said that Mr. Hargrave, whose opinion is of the greatest weight, thinks the true test is the propriety of relation between the principal and adjunct, which may be found out by considering whether they so agree in nature and quality as to be capable of union without any incongruity. (4) There is, it is said, a palpable incongruity between a church steeple and a right of pasture, to take the example put by Jessel M.R.; but what is the incongruity of nature and quality between the right of estovers claimed here and its enjoyment over all the land held with messuage No. 669? It was argued that the fuel wood might be burnt for ash for manure, or used in preparing food for the beasts, for a bonfire or otherwise. I am unable to see on the evidence that this

(1) 4 Rep. 37a.
(2) Co. Litt. 121b.
(3) 1 Ridg. L. & S. 390, at p. 413.
(4) See also Hargrave's note to Co. Litt. 122a

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question really arises. There is no evidence before me that the loads of fuel in the forest ever are burnt for the purpose of ash to manure the ground with. There is no evidence that there was either necessity or convenience in boiling food for cattle in the open air, instead of under some shelter where it would be more convenient and economical. There are, therefore, no grounds for saying that there is a congruity between the enjoyment claimed and the appurtenancy to this messuage sufficient to establish in this particular case, contrary to the general tenor of the cases, appurtenancy to the land as distinguished from the house.

Having arrived at the conclusion that the right in question is one resting in grant appurtenant to the old house, I must now inquire what is the effect of pulling down the old house. The Crown relies on *Costard and Wingfield's Case* (1), in the second volume of Leonard's Reports. I am reading from the edition of 1658—I think there is a material difference in the text in the later edition—on p. 44. This case, which was decided in the 28th year of Elizabeth, was an action of replevin. The defendant avowed for damage feasant; and the plaintiff, by way of replication, justified the putting in of his cattle into the land upon the ground that the town of N. was an ancient town, and that it had been used time out of mind, that every inhabitant of the said town had had common for all manner of cattle levant and couchant within the said town, and so justified. Thereupon the defendant said that the house in which the plaintiff did inhabit in the said town, and by reason of residency in which house he claimed common, was a new house erected within thirty years; and that before that time there had not been any house there, upon which the plaintiff did demur. Shuttleworth, Serjeant, for the plaintiff, argued various things, and stood much on the manner of the prescription. Gawdy, Serjeant, contrary, took exception to the prescription. It will be observed that there was here no question of pulling down an old house and substituting a new one, and there was no question of estovers, but of pasture for cattle only. The Court consisted of Anderson C.J. and Periam and Windham JJ.

(1) 2 Leon. 44.

That term the Court all agreed in the principal case, that the plaintiff should not have common to his new erected house; but the entry of the judgment was respited until the Court had seen the record, and after they had seen and considered upon the record in the following term, "Anderson and Periam were of opinion as before, but Windham did encline to the contrary." So far on the point at issue; "but they all agreed that he who set up again a new chimney where an old one was before should have estovers to the said new chimney; and so if he build a new house upon the foundation of an old house, that he should have common to his said house new erected; so if a house falleth down, and the tenant or inhabitant sets up a new house in the same place; also if a man hath a mill, and a watercourse to it time out of minde, which he hath used time out of minde to cleanse, if the mill falleth and he erecteth a new mill there, he shall have the watercourse, and liberty to cleanse it, as he had before; and afterwards the same term, judgement was given for the defendant, to which Windham, Justice, agreed." It is quite plain there that in the principal case what was decided (Windham J. eventually agreeing) was that there could be no right of common of pasturage in a new house newly built in a town, and therefore the dictum on which "they all agreed" is purely obiter. That is, however, the proposition of the Crown. "If he build a new house upon the foundation of an old house, he shall have common to his said house newly erected." That is not what A. S. Reynolds has done.

Counsel have cited every authority that can be found since *Costard and Wingfield's Case* (1) that in any way bears upon the question whether a man shall have common as before though he rebuild not on the same foundation, or whether he shall have it as before only if he rebuild on the same foundation. Brooke's Abridgement was referred to, where it is said in tit. Incidences, pl. 40 (2): "Que si choses sont append' a un meason, uncor si le meason chiet, les choses reñ append' al soyle ubi meason stetit." That is, so far as it goes, authority for saying that things remain appendant to the soil where the house stood. It does not carry the matter any

(1) 2 Leon. 44.

(2) See also ibid., tit. Barre, pl. 111.

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further, because it merely preserves the possibility of rebuilding on the same spot. The same may be said of a point that was made on the General Inclosure Act of 1845 (8 & 9 Vict. c. 118); s. 53 of that Act provides "That all tofts, foundations, or sites of ancient commonable messuages or cottages, shall, upon proof being made to the satisfaction of the valuer acting in the matter of any inclosure that commonable messuages or cottages formerly stood thereon"—in this instance the word "messuage" is clearly used to signify a house—"be deemed commonable messuages or cottages, and the respective proprietors thereof shall be entitled to the same compensation for the rights of common originally belonging thereto as if such messuages or cottages were still standing." That only shews that the statute there recognizes the importance of the site in view of possible re-erection upon the same site and future enjoyment of existing rights except where lapse of time affords evidence of abandonment. Next is *Luttrel's Case* (1), a case in which a man who had two ancient fulling mills, with a prescriptive right to a watercourse, pulled them down and erected two new corn mills; it was argued that he had lost his prescription to the watercourse, and the same sort of arguments were urged then as have been urged now. It was said: "If I grant to one estovers to burn in his hall, he cannot convert his hall into a kitchen or malthouse: the same law of a prescription; for prescription in such case shall be intended to commence by grant, and in proof thereof they cited Fitzherbert Nat. Brev. 180 H," (to which I have referred above). They contended that "If a man has estovers by grant, or appendant to an ancient house, he shall not have them to an house which he new builds," citing the Year Book Mich. 7 Edw. 4, f. 27, pl. 8, and also Hil. 10 Hen. 7, f. 13, pl. 4, and Trin. 16 Hen. 7, f. 9, pl. 2, where the question was with regard to maintaining divine service in a chapel and whether that obligation remained after the chapel had tumbled down, and it was held that while there was no chapel divine service should cease, but if the chapel were rebuilt in the same place where the old stood, then divine service ought to be performed there; secus

(1) 4 Rep. 86a.

if it were built in another place. In *Luttrel's Case* (1) it was further argued, "If there be lord and tenant, and the tenant holds to cover and repair the lord's hall as in 10 Ed. 3, 23; in this case if the hall falls, yet if the lord builds the hall in the same place where it was before, and of such bigness as it was before, the tenant is bound to cover it; but if it is of greater length or breadth so as prejudice may come to the tenant, or if it is built in another place, or if that which was the hall is converted to a cowhouse, stable, kitchen, or the like, he is not bound to cover it, for the lord by his act cannot alter the nature of the tenure, nor of the service which the tenant ought to do," and so on. Now it is noticeable there, that the argument is put either upon an increase of burden upon the servient person or else upon the assumption that services to be rendered to a house or hall have no application to a cowhouse. The Court, however, decided in favour of the enjoyment of the right. It is true the Court puts the decision somewhat in the language of pleading, because it says it was resolved, following Fitzherbert, "that if a man is to demand a grist mill, fulling mill, or any other mill, the writ shall be general, de uno molendino, without any addition of grist or fulling . . . ."; and, therefore, the Court decided that as the plaintiff had pleaded he had a mill or a right of watercourse to a mill and proved he had a right of watercourse to a mill, he had proved his case, and it did not matter what kind of mill it was. The report, however, goes on, on p. 87b, to say that "Another reason was added that when a man has anything appendant or appurtenant to an house or mill, the most perdurable part of it is the land in which the foundation is, and upon which the whole fabric of it consists and in respect thereof, by grant of all his lands, all his houses, mills, and woods will pass. And so it was resolved, as Popham C.J. said, by Wray and Dyer, Chief Justices, upon conference had with divers other justices upon a case referred to the said Chief Justices"; and then finally it proceeds: "It was resolved that although the house or mill falls by the act or default of the owner, or by the wrong of another, yet forasmuch as the perdurable part, and which includes the whole,

(1) 4 Rep. 86b.

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remains, he may rebuild it without any loss of any appendant or appurtenant to it, but it ought to be upon the same place which was the old foundation of the old house: for as that supported and in judgment of law included the old house when it stood, so it shall support and include the new house, and so in a manner is a continuance of the old house; and so the quære which Perkins makes fol. 128 well resolved. And so it was said in all the cases of estovers and tenures aforesaid, when the alteration of the quality or name of part of the house does not cause any prejudice to the terre-tenant, the estovers and services remain." And then a case is cited at length, which does not carry the present case any further.

It is to be observed that the decision, contrary to the argument, was in favour of what one may call a large view of the right of the commoner. A somewhat similar decision is to be found in *Saunders* v. *Newman* (1), upon a claim of right of water to a mill, where it was admitted that the burden was not increased because the level of the water continued the same, but where it was proved that the tenant had chosen to put in of his own voluntary act a new wheel wholly different from the old wheel. It was held, reversing the opinion of the judge at the trial, that the plaintiff was still entitled to his right, and, as Abbott J. says, " The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery." Holroyd J. said : " The change of the wheel can make no difference ; because at the time it was done it was certainly lawful for the plaintiff to make the alteration."

In *Dunstan* v. *Tresider* (2) it was held, upon a claim for common of pasture and common of turbary by the custom of a manor appurtenant to a tenement within the manor, that the antiquity of the messuage was an integral part of the custom, so that a traverse of the custom put the claimant to proof of the antiquity of his messuage ; but it is pointed out that in that case the plaintiff proved not only that the tenement was built within the last twenty years, but was not built upon the site of any ancient messuage. It is suggested, therefore, that this is a

(1) (1818) 1 B. & Al. 258. (2) 5 T. R. 2.

recognition in 1792 of the view that the site, as well as the antiquity, is a material point.

Finally, the argument in *Arlett* v. *Ellis* (1) is referred to as establishing that this rule has long been recognized to be an integral part of the law. There the Attorney-General shewing cause against a rule was concerned to maintain a right of common of turbary. Before a certain old house was pulled down a new one was built, and both were inhabited for some ten years; and when the old one was pulled down, the person who had been living in the new one claimed a continuance of the common of turbary. The Attorney-General, when he reached this point in the argument, admitted that "inasmuch as turbary can be claimed only in respect of a house, there is a greater difficulty" (2); and, after referring to *Luttrel's Case* (3), proceeded: "The plaintiff, by his replication, has taken issue upon the existence of the ancient right, and not upon the exercise of it at a particular time. If he had intended to rely upon the fact of the house then in existence not being an ancient house, he ought to have rejoined that fact specially." (4) Sir William Follett contra argued, citing several of the authorities now relied upon by the Crown, that there must be a re-erection in the same place if the commoner is to have his estovers. "If," he contended, "the right be transferred to the new house because it stands in the same garden or tenement, upon the same principle it might be transferred to twenty or thirty houses there." (5) The decision of the Court was that under the circumstances, having regard to the pleadings and facts, it was unnecessary for the Court to pronounce any decision as to the question raised on the plea of common of turbary. But, it is said, would the Attorney-General have allowed Sir William Follett to urge an argument of that kind and leave it uncontradicted, virtually admitting its force and pressure, if he was in a position to say that in the view of the profession re-erection on the same foundation was not necessary, but re-erection somewhere near was sufficient? Hence, it is said,

(1) 9 B. & C. 671.
(2) 9 B. & C. at p. 683.
(3) 4 Rep. 87.
(4) 9 B. & C. at p. 684.
(5) Ibid. at p. 687.

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all these cases being referred to and reviewed before the Court on that occasion, the fact that nobody impugned the proposition laid down in *Costard and Wingfield's Case* (1) is of itself an important recognition of its authority. No great weight attaches to the case of *Arlett* v. *Ellis*. (2) If the facts had been gone into, the case could not have been maintained at all; and the Attorney-General made no serious admission in saying that the plea of common of turbary encountered "greater difficulty." It was enough to win on the pleading point and get the rule discharged without dealing with Sir William Follett's propositions.

Next, a book of great authority, the late Mr. Elton's work on Commons, was cited as shewing that re-erection in the same place is necessary. On p. 142 he says: "If the house of a freeholder, who has common of pasture for beasts levant and couchant, should fall down and be erected in another place, the common remains unaltered, because it was appendant or appurtenant to the land and not to the house" (3); and at p. 143: "It was very early decided that, when a house was pulled down only to be rebuilt, the right of common attached to the old house will continue to the new. (4) And it was suggested in one case that the house need not be built upon the old site." He cites *Costard and Wingfield's Case* (5), both from 2 Leonard and from Godbolt, and does not express any opinion as to the value of that suggestion. On the other hand, there is a series of passages, none of them in themselves very conclusive, but all of them singularly lax, in the mouths of judges not in the habit of being lax, if it be true that in order to preserve the right the new building must rest not merely in the same place generally, but on the same foundation or site. In *Bryers* v. *Lake* (6) it was said that "if an ancient cottage which had common be fallen down, and another cottage is erected in the place where

(1) Godbolt, 96, pl. 110; Anderson, 151, pl. 200; Gouldsborough, 38, pl. 11; Savile, 81; 2 Leon. 44; Owen, 4, sub nom. *Wakefeild's Case*.

(2) 9 B. & C. 671.

(3) Citing Fitzh. Nat. Brev. 180 H.; *Costard* v. *Wingfield*, 2 Leon. 44; Owen, 4.

(4) Citing *Moore* v. *Rawson*, 3 B. & C. 332, at p. 339; *Bryers* v. *Lake*, Sty. 446; *Luttrel's Case*, 4 Rep. 86; *Cooper* v. *Andrews*, Hob. 40.

(5) 2 Leon. 44; Godbolt, 97.

(6) Sty. 446.

the old cottage stood; this is no new cottage, but it may claim common as an ancient cottage by prescription. Nota." *Moore* v. *Rawson* (1) was a case where the re-erection was on the same site and where the identity of site was material to the right claimed, which was an easement of light. The Court appears to treat the matter not as depending upon the new bricks and mortar as distinguished from the old, but upon the question whether or not there had been the substitution of a similar thing in renovation of, or the creation of a new thing wholly different from the old, shewing an intention to abandon the old thing. Holroyd J. puts it most strongly; he compares the renovation of the old house or mill with the creation of a new thing. "There is," said the learned judge (2), "not only nothing to shew that he"—i.e., the plaintiff's predecessor in title —"meant to renovate the house so as to make it a continuance of the old house, but he actually builds a new house different from the old one, thereby shewing that he did not mean to renovate the old house." Now "a continuance of the old house" is the very expression used in *Luttrel's Case.* (3) There is then the passage that I have already read from Lord Hatherley in *Warrick* v. *Queen's College, Oxford* (4), where the expression is "the house which supplies the place of that house." There is the language in *Carr* v. *Lambert* (5), a judgment of the Exchequer Chamber, where, dealing not with estovers, but with a right of common of pasture for cattle levant and couchant upon a tenement, Willes J. treats the question of abandonment as depending not upon a shifting of position, but upon the character of the dominant tenement being so altered that it could not be applied to the purposes of the right claimed, by the destruction, absolute or temporary, of the necessary measure of enjoyment, so that "a right, once created and existing, was under these circumstances destroyed by the act of the proprietor." That was a considered judgment intended to be of wide application, and making no reservation of a case of estovers where the house to which they are claimed as appurtenant has been rebuilt, but not upon

(1) 3 B. & C. 332.
(2) 3 B. & C. at p. 338.
(3) 4 Rep. 86a, at p. 87b.
(4) L. R. 6 Ch. 716, at p. 730.
(5) L. R. 1 Ex. 168, at p. 176.

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its former site. In *Lord Rivers* v. *Adams* (1) the expression used in a considered judgment delivered by Kelly C.B. is, "the old house remained and was occupied, so that it"—i.e., the new house—"was not in substitution for, but in addition to, the old house, and thus any prescriptive right acquired by the old house could not apply to this." Again, the text-books of authority, Shelford's Real Property Statutes, Woolrych on Commons, and Tudor's Leading Cases on Real Property, all assume that the right survives not only where the house is rebuilt on the same site, but also where a new house is built in substitution for another, and built in another place, so long as it is intended to be in renovation of the old, and not in creation of something absolutely new.

It appears to me that there is no settled rule upon the authorities. If there were, even though it rested ultimately upon a mere obiter dictum, I could not interfere with it, because in this class of right, the history of which is measured by the flight of centuries, the most reasonable law is that which is the most certain, and rights of property are not to be upset merely because, when historically traced through the reports, they rest on an obiter dictum. But the comparison of these two sets of authorities seems to shew that there is no settled and recognized rule which has been made the basis of subsequent transactions and rights. I have therefore to consider not only whether this rule is just in itself, but also whether it was ever laid down at all. The reason for asking this question is that in *Costard and Wingfield's Case* as reported in Godbolt (2) the following passage occurs:—"But Windham, Justice, did encline to the contrary: but they did all allow, that he who new builds an old chimney shall have estovers, so a house common. So if a house fall down, and the tenant build it up again in another place." That is precisely what A. S. Reynolds has done. If, therefore, *Costard and Wingfield's Case* (2) as reported by Godbolt is right, it supports A. S. Reynolds. It is only if as reported in 2 Leonard it is right, that it supports the Crown. Now the history of the matter appears from Mr. Hughes's preface to Leonard's Reports to be this. Mr. William Leonard, a learned

(1) 3 Ex. D. 361. (2) Godbolt, 96, at p. 97.

lawyer of the time of Elizabeth, took notes of many cases in Norman French. He was a member of Gray's Inn, and there were extant various copies of his notes. Serjeant Sir Robert Hitcham in the early part of the seventeenth century had one copy of some of these cases; Serjeant Davenport, who afterwards became Lord Chief Baron of the Court of Exchequer, had another copy of others of them; and they were evidently known in the profession and used by various learned persons in the course of their several practices, and other copies of some of these cases became dispersed abroad. The originals, all of them in Leonard's handwriting, came into the hands of Mr. William Hughes, of Gray's Inn, "having," in the words of Mr. Hughes, "been delivered to me by a worthy gentleman of the said Society of Gray's Inn, who had them out of the library, sometimes belonging to the said Mr. Leonard. These cases, having been lately truly and carefully translated by me out of the original French copy into English, have, since the translation thereof, been perused and approved of by many eminent professors of the law." That is the history of the report in 2 Leonard. Godbolt's reports have no more connection with Mr. Justice Godbolt of the time of Charles I. than that they were "lately reviewed, examined, and approved of by the late learned Justice Godbolt"; they were various reports taken in the reigns of Elizabeth, James I., and Charles I. in the various Courts. They were published in 1652 by the same Mr. W. Hughes "of Gray's Inn, Esquire." (1) Now the question arises, the original report having been taken in Norman French in or about the year 1588 and not published until the middle of the following century, and then in translations, and both translations having been published by Mr. Hughes, which is right. If the report which Mr. Hughes first published is right, then this rule has no express foundation in the books; if his second report is right, then there may be some foundation for such a rule. It is true that the report in Godbolt is badly printed and badly corrected; the title of Serjeant Shuttleworth, for instance, is misprinted, and he is reported as arguing something which is the direct contrary of what he is reported as

(1) See title-page to Godbolt's Reports.

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arguing in Leonard. In this instance Leonard must be right and Godbolt must be wrong. Mr. Austen-Cartmell argued, therefore, that in the passage where the two reports contradict one another at the end of the case, the report of Leonard must be right and the report of Godbolt must be wrong. I do not think this follows, but the matter goes a little further. There were three other reports of this case, and one of them is a report in Norman French by the learned Chief Justice (1), who presided at the decision of it; in that report there is no trace of this obiter dictum; and the correctness of his report is thus far supported that, as appears by the record in the Record Office, he has at any rate got the christian names of the parties right. I should presume, therefore, he had the surnames right as well, and he reports it under a different name from that under which Hughes reported it, namely, Wakefield, and the authority of Anderson C.J. as a judge, as well as a reporter, stands high. Furthermore the case is reported in Owen's Reports (2), whose authority also stands high. These reports, though not in Norman French, are at any rate very much nearer contemporary reports, because Serjeant Owen, who was afterwards Queen's Serjeant to Elizabeth and then a justice of the Common Pleas, was, I think, actually a member of the Bar at the time of the decision of this case. He was called to the Bar in 1570 and became a Serjeant in 1589; he is therefore a contemporary authority. Not one word of this obiter dictum appears in his report. The remaining contemporary report (3)—it is true it is printed in the seventeenth century, but it comes down from some prothonotaries of the previous century—is silent as to it also. That is Gouldsborough's report. I surmise that, if the manuscripts of Leonard could be recovered, it would be found that the whole of this obiter dictum is really a gloss imported by persons using the manuscript reports as a series of authorities, and that it has no relation whatever to what passed between Anderson C.J., Periam J., and Windham J. But the dilemma is clear; either Anderson C.J. did not think the obiter dictum worth reporting,

(1) Anderson, 151, pl. 200. (2) Owen, 4.
(3) Gouldsborough, 38, pl. 11.

or else it never was uttered. I think I cannot assume in the face of that conflict of authority that the report in Leonard is right, and I have the gravest doubt if this passage ever came from the lips of the judges in *Costard and Wingfield's Case* (1) at all. Furthermore, if it were the very text of what they said, it is open to doubt whether "if he build a new house upon the foundation of an old house" (2) is or is not intended to be the same thing as "sets up a new house in the same place." (3) If it is the same thing, there is a tautology; if they are different things, then the case records that he shall have his estovers, not only if he build upon the foundation of the old house, but also if he set up a new house in the same place, that is to say there or thereabouts, though not on the same foundation. If that is the true interpretation, it falls into line with the report in Godbolt.

It remains to ask, what is the rational rule to lay down on such a point? Ex hypothesi this right rests in grant; if you test it by the supposition that the lost grant were producible, you would find a grant appurtenant to the house. But you would find, because the law is so clearly laid down, that there was provision in the grant which, in one form of words or another, permitted the commoner to enjoy the right in respect of a new house which he of his own volition substituted for the old one. Whatever the reason of the substitution, he would enjoy the right, and the terms of the grant would record it in respect of the new house. Are the words conferring the right in respect of the new house to be construed as words of grant, and therefore in favour of the grantee, or as words of covenant by him in which he imposes upon himself a restriction, and therefore to be read in favour of the covenantee? That is one test to apply. Or would the grant be presumably expressed in the terms that it was to be appurtenant to his house called so and so, or any other house which he might erect in continuance thereof? That is using the very language of *Luttrel's Case*. (4) It is quite true that in *Luttrel's Case* (5) the Court said "it ought to be upon the

(1) Godbolt, 96, pl. 110; 2 Leon. 44; Anderson, 151, pl. 200; Goulds-borough, 38; Savile, 81; Owen, 4, sub nom. *Wakefeild's Case.*

(2) 2 Leon. 44, at p. 45.

(3) Ibid.

(4) 4 Rep. 86a.

(5) 4 Rep. at p. 87b.

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same place, which was the old foundation of the old house"; but I do not think that necessarily means that it must essentially be so. No doubt it ought in the interests of the commoner himself, because the more it is on the old foundation the less need there will be to try a case about it; but I do not think that the Court intended to resolve that there can be no continuity unless there is identity of site, nor do I think that the figurative language about the soil being the most perdurable part of the house can be pressed to import that the identity of the site is an essential part of the identity of the messuage. However the right might be expressed in the grant, I think it is reasonable to assume that the grant should be read in favour of the grantee of a right appurtenant to a house then existing or to a new house in continuance of the same. What continuity may be is another matter; that is a question of fact. I do not think it is limited to identity of site. Contiguity is no doubt a good test of continuity, and I daresay that any considerable remoteness in the new building would, unless there were modifying circumstances, go far to destroy the continuity. But as soon as it is conceded, as the ancient cases establish, that when the house falls down it may be re-erected and still be for this purpose the same house, so that the right is still appurtenant to it, I think it follows in reason that it may be re-erected, not necessarily on the same foundation, but somewhere in the same place to supply the place of the old house, as Lord Hatherley says, and in continuance of the old house and the exercise of the old right. Mr. Austen-Cartmell argued, logically enough from his premisses, that if this house stood on the bank of a stream, and the stream cut away the house and the foundation, it would also cut away the right, and the house could not be re-erected on the nearest adjacent foundation. It would have to be contended that if the house were burnt down, and the cost of clearing away the debris made it impracticable to build on the old foundation, the right would go because it could not be transferred to another site; and so, I suppose, if under local by-laws or Acts the house had to be moved by reason of the unhealthiness or unfitness of the site for habitation. It seems difficult to see what reason there can be in a rule which says that if the commoner rebuild the house on

the same foundation, a new house for an old one, even although in the materials, the mode of enjoyment, and the appearance it be different, he may still retain his estovers, but if he rebuild the house, for the old purpose, of the old dimensions, not a stride away, because he cannot do otherwise, yet he shall lose his estovers. It seems pedantic to say that a house is the same house merely because it stands on the same rectangle of ground, although not one brick or one line of it be the same, and a house adjoining that rectangle is a different house merely because it stands close to but not on the old spot. The argument is pressed as far as this: if it were a frame house entirely constructed of timber, which could at no considerable expense be moved off the old site without taking it to pieces and allowed to rest a few feet further off, then although actually the same house it is not the same for this purpose, because the land has not been taken with it. It would be pedantry so to hold, and I am quite satisfied that pedantry is not the spirit of the common law in these matters. It is not now reasonable to lay down as a rule of the common law, applicable to a right of fuel in the nature of common of estovers, that it is enjoyable in a newly-erected tenement only if it occupy precisely the same site or some part of the same site as the previous one. It is enough if the right is to be exercised therein in continuance of the old right, as this was certainly intended to be, and if there be no circumstances to inflict any additional burthen or injustice upon the lands over which the right is enjoyed.

I come, therefore, to the conclusion, after very careful attention to the authorities which have been fully brought to my attention, that the point has not been decided by any authority that binds me; that even as an undecided point it is not one on which any definite opinion in favour of the Crown has ever been expressed; but that it is open for decision now in this case, and that my decision must be in favour of the defendant, with costs.

*Judgment for defendant.*

Solicitor for Crown: *Denham W. Westmacott.*

Solicitors for defendant: *Horne & Birkett.*

W. H. G.

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*June* 21.

## BEVAN *v.* SHEARS.

*Schools—Non-attendance of Child at Public Elementary School—Reasonable Excuse—Efficient Instruction in some other Manner—Standard of Efficiency—Jurisdiction of Justices to decide whether Education efficient—Elementary Education Act*, 1870 (33 *&* 34 *Vict. c.* 75), *s.* 74—*Elementary Education Act*, 1876 (39 *&* 40 *Vict. c.* 79).

By a by-law made under s. 74 of the Elementary Education Act, 1870, as amended by the Education Acts, 1876 to 1902, it was provided "that the parent of every child of not less than five years or more than fourteen shall cause such child to attend school unless there be a reasonable excuse for non-attendance," and that the following reason (inter alia) should be a reasonable excuse, namely, "that the child is under efficient instruction in some other manner."

An information was laid charging a parent with having unlawfully and without reasonable excuse neglected and omitted to cause his child to attend school as required by the by-law. The parent had arranged with a lady for the education of the child, and the justices found as a fact that the education the child was receiving was efficient and dismissed the information upon that ground:—

*Held*, that the justices had jurisdiction to decide that the education the child was receiving was efficient without deciding that it was as efficient as he would have received at a public elementary school.

Case stated by justices for the county of Pembroke.

An information was preferred at the petty sessions held at Pembroke on February 4, 1911, by the appellant Bevan, a school attendance officer, charging the respondent with having on November 10, 1910, unlawfully and without reasonable cause neglected and omitted to cause his child Ernest, of the age of thirteen years, to attend school as required by the by-laws made by the Pembrokeshire County Council under s. 74 of the Elementary Education Act, 1870, as amended by the Education Acts, 1876 to 1902, for the administrative county of Pembroke (exclusive of the borough of Pembroke), and sanctioned by the Board of Education. By by-law 2 it was provided "that the parent of every child of not less than five years or more than fourteen shall cause such child to attend school unless there be a reasonable excuse for non-attendance." The by-law further provided that the following reason (inter alia) should be a reasonable excuse, namely, "that the child is under efficient instruction in some other manner."

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It was proved or admitted that the child was during September and October, 1910, attending Lamphey Council School, but that, on or about October 28, the respondent, feeling aggrieved by the conduct of the headmaster in punishing his son by keeping him in school during play hours for one month, prevented him from attending that school any longer. On November 7 and 8, 1910, the child attended at another public elementary school (Manorbier School) distant about four miles from the respondent's house, but, owing to the Pembrokeshire education authority considering the removal capricious, the transfer of the child to the latter school was refused and the attendance was not continued. On November 10, 1910, the day in respect of which the summons was issued, the child received no education whatsoever. On December 5, 1910, the respondent arranged with a Miss Grant for the education of the child, and that education was continued to the date of the hearing of the summons taken out by the appellant. The Lamphey School had been condemned by the education authority and a new schoolhouse was being built on another site. Miss Grant, the teacher above referred to, was the only witness who gave evidence as to the nature and quality of the instruction given to the child.

The justices, after hearing her evidence, dismissed the summons, holding as a fact that the education the child was receiving was efficient. They did not consider the removal of the child to Manorbier School capricious, having regard to the punishment inflicted, as to which, in their opinion, the respondent had a just grievance, it being in their opinion too harsh. The appellant's solicitor applied to be allowed to put in rebutting evidence that according to Miss Grant's own statement the education given by her to the child was not as efficient as it would have received had it been attending a public elementary school, but this application was refused. The list of subjects taught at Lamphey School was produced to the justices, and also the list of subjects taught by Miss Grant, and, in their opinion, the two lists were almost the same.

The fact that the boy was receiving no education on one particular day did not weigh with the justices.

The questions for the opinion of the Court were whether the

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information could be dismissed and a decision come to that the education given to the child was efficient (*a*) without deciding that it was as efficient as the child would have received in a public elementary school; (*b*) without having regard to the standard of education corresponding to the age of the child prescribed by the minutes of the Board of Education.

*W. R. Briggs* (*Sir W. R. D. Adkins* with him), for the appellant. In adjudicating upon a summons for neglecting to cause a child to attend a public elementary school the justices cannot in law come to the conclusion that the child is receiving efficient instruction in some other manner unless they take into consideration the standard of education the child would have received at a public elementary school. Sect. 48 of the Elementary Education Act, 1876, defines the term "efficient school." The kind of evidence which ought to be given as to the education the child is receiving is indicated by the evidence it was proposed to give before the justices on behalf of the applicant in *Rex* v. *West Riding of Yorkshire Justices.* (1) [The Elementary Education Act, 1870, s. 74, the Elementary Education Act, 1876, ss. 4 and 5, and the Code of Regulations for Day Schools, 1902, were also referred to.]

*Bertram Jacobs*, for the respondent. The justices were not bound in law to find that the education the child was receiving was according to any particular standard. They only have to be satisfied that the child is in fact receiving efficient instruction. There is nothing in the Education Acts, 1870 to 1902, which takes away from the parent the right to have his child educated according to his own ideas and, if necessary, idiosyncrasies. The only standard of efficiency is that which appears from the word itself, namely, that the instruction must be efficient.

LORD ALVERSTONE C.J. In this case the respondent was summoned for having unlawfully and without reasonable excuse neglected and omitted to cause his child Ernest to attend school as required by the by-laws made by the Pembrokeshire County Council under s. 74 of the Elementary Education Act, 1870, as

(1) [1910] 2 K. B. 192.

amended by the Education Acts, 1876 to 1902. These by-laws require that the parent of every child of not less than five years or more than fourteen years of age shall cause such child to attend school unless there be a reasonable excuse for non-attendance. One of the reasons which is to be held a "reasonable excuse" is "that the child is under efficient instruction in some other manner." In the absence of anything in the by-laws providing that a child of a given age shall receive instruction in given subjects, in my view it cannot be said that as to a particular child there is a standard of education by which the child must be taught. Efficient instruction must mean the effective education of that child whose non-attendance at the school of the education authority is sought to be justified, and therefore the justices have to decide whether in their opinion the child is being taught efficiently so far as that particular child is concerned. In the present case the justices found as a fact that the subjects taught by Miss Grant were almost the same as those in which the child would have received instruction if he had continued to attend Lamphey School in the ordinary way, and without deciding on any particular ground they have found that the education the child was receiving was efficient. They also said that they did not consider the removal of the boy to Manorbier School was capricious having regard to the punishment inflicted. We are now asked by the appellant to say that their decision dismissing the summons was wrong because they did not compare the education the child was receiving with the standard of education he would have received at a public elementary school and upon the further ground that they did not consider the standard of education corresponding to the age of the child prescribed by the minutes of the Board of Education. What is really meant by the second ground upon which we are asked to say the justices were wrong I do not quite understand. We have not been referred to any minutes of the Board of Education prescribing that children of a certain minimum age are to receive any particular standard of education. Counsel for the appellant have not been able to refer us to any such document or to any standard of efficiency provided by the Board of Education, nor have we been referred to any authority containing

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any definition of "efficiency." In these circumstances we decide that it is an answer to a summons for the non-attendance of the child at the authority's school that the child was being properly educated, and that the justices were entitled to find that the education this child was receiving was efficient. The decision of the justices was not wrong because they refused to set up a hypothetical standard of education.

DARLING J. I am of the same opinion. The law requires the parent to cause his child of a given age to attend school unless there is a reasonable excuse for non-attendance. One of the excuses for non-attendance which the by-laws provide as being "reasonable" is "that the child is under efficient instruction in some other manner." The justices found that the child was being efficiently taught by Miss Grant. They found that the education the child was receiving was efficient. The appellant desired to impose upon the parent the duty of shewing that the education the boy was receiving was given in the same way and was equal to that given in Lamphey School. But it may be efficient although it is given in some other manner.

If we agreed with the appellant's contention we should have to say that if the child had been educated at a good State school in Germany, according to the curriculum in that country, he would not be receiving efficient instruction, and that the parent must be convicted because the instruction the child was receiving in Germany did not compare with the curriculum at Lamphey School. The fact that the German curriculum differed from that of an English elementary school might be the reason for the parent sending his child to Germany. The same observation might be made if the child had been sent to Eton or a French lycée. In my opinion the justices were entitled to find that the respondent had in every way complied with the law in having his child efficiently instructed in some other manner than that of attending Lamphey School and upon that ground to dismiss the information.

BANKES J. I agree. I only wish to say a few words in addition to what has been said by the Lord Chief Justice and my brother Darling. Where a case of this kind is brought

before justices and the excuse is put forward by the parent that his child is under efficient instruction "in some other manner," in my view a very difficult question of fact often arises for the justices to determine. I do not wish it to be even suggested that the effect of our decision is that the justices should disregard the accepted standard of education for a child of that age in an elementary school. I do not say that that test should be applied in all cases; but in my opinion such a test may be a most useful guide in considering whether the child is receiving efficient instruction. It is a very different proposition to say that the justices must be considered as bound by that standard. In my view that is what is suggested in the last paragraph of the case. It seems to me to be impossible to accept that view.

The first question asked us is whether the information could be dismissed and a decision come to that the education given to the child was efficient without deciding that it was as efficient as the child would have received in a public elementary school. If that test had to be applied the justices would have to ascertain the standard of education given in the school which the child would attend in ordinary course. Then they would have to consider whether the instruction which the child was in fact receiving was less or more efficient than that standard. It is in my opinion quite impossible to hold that the justices ought to have decided this case in the way suggested by the question.

The second question, I confess, I do not understand. I doubt whether those who drafted it have considered whether there is such a thing in existence as "the standard of education corresponding to the age of the child prescribed by the minutes of the Board of Education." We have not been referred to any such standard and I do not know whether any such thing exists. I agree that the appeal must be dismissed.

*Appeal dismissed.*

Solicitors for appellant: *Rawle, Johnstone & Co., for M. George, Haverfordwest.*

Solicitor for respondent: *W. H. Sanders, for Reed & Leleu, Pembroke.*

J. E. A.

C. A.
1911
*July* 8.

[IN THE COURT OF APPEAL.]

## HAMP-ADAMS *v.* HALL.

*Practice—Writ of Summons—Indorsement of Date of Service within three Days—Proceedings by Default—Non-compliance with Rule—Order* IX., *r.* 15.

A writ of summons having been served, the date of service was not indorsed thereon within three days as required by Order IX., r. 15. The plaintiff subsequently signed judgment in default of appearance, and a verdict for damages was given by a jury in the sheriff's court:—

*Held*, that non-compliance with Order IX., r. 15, was not an irregularity which could be waived, and that the plaintiff, not having complied with the rule, was not entitled to proceed by default, and that the judgment and verdict must, therefore, be set aside.

APPEAL from Bucknill J. at chambers.

On November 14, 1910, the plaintiff issued a writ in the King's Bench Division against the defendant, claiming damages for assault. The plaintiff obtained an order on November 23 for substituted service by prepaid letter addressed to the defendant at his club in London. Service of the writ was effected in the prescribed manner on November 24. The defendant did not appear; judgment was signed against him; and the case was remitted to the sheriff's court for assessment of damages, where, in the absence of the defendant, a jury returned a verdict for 1500*l.* The defendant subsequently applied to Bucknill J. in chambers to set aside the judgment and verdict on the ground that he had had no knowledge of the proceedings until after the verdict. Bucknill J. refused the application.

The defendant appealed.

On the hearing of the appeal the case for the defendant was based on a non-compliance with Order IX., r. 15 (1), in that, the writ having been served on November 24, the person who served

(1) Order IX., r. 15: "The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made. This rule shall apply to substituted as well as other service."

the writ had not indorsed thereon the day of the month and week of service until November 30, i.e., more than three days after service.

*McCall, K.C.*, and *E. G. Palmer*, for the defendant. The plaintiff having failed to comply with Order IX., r. 15, was not at liberty to proceed by default, and the defendant is entitled ex debito justitiæ to an order that the judgment and the subsequent proceedings be set aside: *Anlaby* v. *Praetorius*. (1)

*Mallinson*, for the plaintiff. The failure to indorse the writ within the due time was a mere formal defect or irregularity which could be and which was in fact waived by the defendant. This application was not made within a reasonable time after knowledge of the irregularity, and therefore, under Order LXX., r. 2, the application ought to be dismissed: *Foat* v. *Basset* (2); *Lloyd* v. *Great Western Dairies Co.* (3) In any event, as this point was not raised before the judge at chambers, there should be no order for any costs of the application: *Dye* v. *Dye*. (4)

VAUGHAN WILLIAMS L.J. In this case there was an order for substituted service of a writ. Order IX., r. 15, which is expressly applied to substituted service as well as to other service, requires that within three days at most after service the person serving the writ shall indorse on it the day of the month and week of the service, otherwise the plaintiff shall not be at liberty in case of non-appearance to proceed by default. The writ was served on November 24, and the indorsement was not made until November 30. Therefore it cannot be denied that the rule has not been complied with, and it follows that the plaintiff was not entitled to proceed by way of default. It is contended for the plaintiff that the non-compliance with the rule has been waived by the defendant. In my opinion it was impossible for the defendant to waive the defect, for the result of the non-compliance with the rule was that there was no writ on which the plaintiff was entitled to proceed. Then it was said that at the most the

(1) (1888) 20 Q. B. D. 764.
(2) [1888] W. N. 255.
(3) [1907] 2 K. B. 727.
(4) (1884) 13 Q. B. D. 147, at p. 158.

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Vaughan Williams L.J.

case should be regarded as one in which there has been a mere irregularity, and Order LXX., r. 2, was called to our attention as shewing how the right of a party to take advantage of a defect in the nature of an irregularity may be limited or taken away. In my opinion that rule has no application to the circumstances of the present case. It is said that it is a very severe penalty to put on a mistake of this kind that all the subsequent proceedings should be set aside. I am not at all impressed by that argument. Where proceedings are taken by a plaintiff in the absence of the defendant it is most important that there should be at every stage a strict compliance with the rules, and therefore it is a reasonable and proper thing in the case of proceedings by default to treat non-compliance with such a rule as Order IX., r. 15, not as a mere irregularity which can be waived, but as a matter which prevents any further proceedings from being taken on the writ.

This application therefore succeeds, and there must be an order to set aside the judgment. The defendant will have the costs of this appeal, but with reference to the costs before the judge in chambers, as the parties then discussed matters which have not come before us to-day and upon which we have not had to adjudicate, I think those costs ought not to be charged against either side.

BUCKLEY L.J. When a plaintiff issues process in the High Court of Justice he has to acquaint the defendant of the fact. That is done by service, which may be effected either on the defendant personally, or an order may be obtained in proper circumstances for substituted service. The latter course was followed in this case. A defendant thus served has to enter an appearance, and if he fails to do so the proceedings may be continued by the plaintiff in the defendant's absence under certain rules applicable to default of appearance. That was done in this case, but Order IX., r. 15, expressly provides that in the circumstances which occurred the plaintiff shall not be at liberty in case of non-appearance to proceed by default. That is a rule, therefore, which imposes a penalty on a plaintiff if he does not comply with it. Notwithstanding, however, that the rule had

not been complied with, the plaintiff did proceed by default and signed judgment, and the action was sent to the sheriff's court, where the damages were assessed by a jury. It is clear that the proceedings have been wrong throughout. There are two parties to blame. The plaintiff ought not to have signed judgment. But further there must have been a slip in the offices of the Court, for the affidavit of service stated that the writ had been served on November 24 and that the indorsement was not made until November 30. The non-compliance with the rule ought, therefore, to have been detected by the officer.

The judgment and the assessment of damages were plainly wrong, unless Order IX., r. 15, can be read in this way: "otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default unless the Court or a judge shall retrospectively think proper to give effect to the judgment as if the rule had been complied with." But supposing that the rule could be read in that way, ought the Court retrospectively to treat proceedings as valid which have been taken against a defendant in his absence? I think not. Where a plaintiff proceeds by default every step in the proceedings must strictly comply with the rules; that is a matter strictissimi juris. That has not been done in this case, and on these grounds I am of opinion that this judgment must be set aside. I agree that in the circumstances there ought to be no costs of the proceedings before the judge in chambers.

*Appeal allowed.*

Solicitors for plaintiff: *Herbert J. C. Sumpter & Co.*
Solicitors for defendant: *Adam Burn & Son.*

F. O. R.

1911
*July* 25.

## ECCLESIASTICAL COMMISSIONERS FOR ENGLAND, Appellants *v.* PAGE and Others, Respondents.

*Licensing Acts—Justices—Committee of Quarter Sessions acting as Compensation Authority—Supplemental Meeting—Power to state a Case—Apportionment of Compensation—Person interested in Licensed Premises—Registered Owner—Lord of the Manor—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2—*Licensing Rules*, 1904, *rr.* 27, 37.

The committee of quarter sessions appointed under the Licensing Act, 1904, when holding a supplemental meeting for the purpose of settling the shares in which the compensation money is to be divided among the persons entitled to compensation, has power to state a case for the opinion of the King's Bench Division.

The freehold in all the copyhold lands in a manor was vested in the appellants, who were entitled to all the usual manorial rights, including a fine on the admittance of a tenant. A beer-house was situate on copyhold land within the manor of which the respondents were copyhold tenants holding the same by copy of court roll. The appellants were registered as owners of the beer-house. The renewal of the licence of the beer-house having been refused :—

*Held*, that the appellants were persons interested in the licensed premises as owners, and were, therefore, entitled to share in the compensation money.

Case stated by the committee of the Bedfordshire quarter sessions appointed under and pursuant to s. 5 of the Licensing Act, 1904 (4 Edw. 7, c. 23), to exercise the powers and perform the duties delegated to the said committee by the said quarter sessions as provided by the said Act and hereinafter called "the compensation authority."

At a supplemental meeting of the said compensation authority at Bedford on July 28, 1910, for the purpose amongst other things of considering whether their approval should be given to the agreed amount of compensation money in respect of certain licensed premises known as the Cross beer-house at Langford, in the county of Bedford, and for the purpose of settling the shares or fixing the proportions in which the compensation money should be divided among the persons entitled to compensation, the appellants appeared and claimed to be entitled to a share of the compensation money, and upon hearing the claim, which was opposed by the respondents, the compensation

authority held that the appellants were not entitled to any share in the compensation money subject to the opinion of the King's Bench Division of His Majesty's High Court of Justice upon the following case :—

1. The appellants are the lords of the manor of Holme with Langford in the county of Bedford, and the freehold of and in all the copyhold lands, tenements, and hereditaments within the said manor is vested in the appellants, who are also entitled to all the usual manorial rights.

2. The respondents Joshua Page, Mary Constance Temple, and Frank Peters Wood (trustees of the will of the late Mrs. Alberta Frances Page) are the copyhold tenants of certain licensed premises known as the Cross beer-house at Langford within and parcel of the said manor and hold the same by copy of court roll under an admittance dated April 30, 1910. The respondents Messrs. Page & Co. are the lessees and the respondent Frederick Charles Bartram is the licensee of the said premises.

3. The said manor is a fine arbitrary one, and the lords of the manor are entitled to a fine of two years' improved annual value on the admittance of a single tenant on death or alienation, but it is the practice to accept one and a half years' annual value on the admittance of a single tenant on alienation.

4. The respondents Joshua Page, Mary Constance Temple, and Frank Peters Wood (trustees of the will of the late Mrs. Alberta Frances Page) paid to the appellants as lords of the said manor upon their admittance as copyhold tenants of the said licensed premises on April 30, 1910, a fine of 42*l.*, based upon the annual value of the premises as licensed premises being 12*l.* The usual practice on the admittance of joint tenants of halving the fine of the first tenant for the admittance of the second and halving the fine of the second tenant for the admittance of the third was observed, and the said sum of 42*l.* was arrived at as follows :

| | | | |
|---|---|---|---|
| First tenant . . . . . | £24 | 0 | 0 |
| Second tenant . . . . . | 12 | 0 | 0 |
| Third tenant . . . . . | 6 | 0 | 0 |
| | £42 | 0 | 0 |

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5. The said compensation authority at their principal meeting held on June 23, 1910, refused the renewal of the licence of the said premises subject to compensation pursuant to s. 1, sub-s. 2, of the Licensing Act, 1904.

6. In consequence of the said compensation authority having refused the renewal of the licence of the said premises the annual value thereof is considerably reduced.

7. The appellants and the respondents Mrs. Page's trustees and the respondents Messrs. Page & Co. are entered as the registered owners of the said licensed premises in the register of licences kept pursuant to s. 36 of the Licensing Act, 1872.

8. The total amount of the compensation money was agreed at 139*l.* 18*s.*, and it was further agreed that if the appellants were entitled to a share of the compensation they should receive the sum of 15*l.* out of the said sum of 139*l.* 18*s.*

9. It was contended on behalf of the appellants that as the amount of the fines depended upon the annual value of the said premises and the refusal of the renewal of the licence had reduced the annual value they were persons interested in the said premises within the meaning of s. 2, sub-s. 1, of the Licensing Act, 1904, and therefore entitled to a share of the said compensation money. It was also contended on behalf of the appellants that they were the owners of the fee simple and the registered owners of the said licensed premises and therefore persons interested in the same within the meaning of the said section and entitled to a share of the said compensation money.

10. It was contended on behalf of the respondents that the appellants were not persons interested in the said licensed premises within the meaning of s. 2, sub-s. 1, of the Licensing Act, 1904, and were not entitled to any share of the said compensation money.

11. The compensation authority held that the appellants were neither owners nor in the position of owners of the said licensed premises and were not persons interested in the same within the meaning of s. 2, sub-s. 1, of the Licensing Act, 1904, and were therefore not entitled to any share of the said compensation money, and, having approved the agreed sum of 139*l.* 18*s.* as

the total amount of compensation money in respect of the said premises, ordered payment thereof as follows:

| | | | |
|---|---|---|---|
| To Mrs. Page's trustees, the registered owners | £11 | 0 | 0 |
| To Messrs. Page & Co., lessees . . . . | 108 | 10 | 0 |
| To Frederick Charles Bartram, the licensee . | 20 | 8 | 0 |
| | £139 | 18 | 0 |

12. The question for the opinion of the Court is whether the said compensation authority were right in holding that the appellants were not entitled to any share of the compensation money agreed at 139*l.* 18*s.* and approved by them as hereinbefore stated.

13. If the Court shall be of opinion in the affirmative, the order of the compensation authority is to be affirmed. If in the negative, the said order is to be quashed and the Court is requested to give such judgment or to make such order as ought to have been made by the said compensation authority or such other order as the Court shall think fit.

*Foote, K.C.* (*Dyer* with him), for the appellants, read the case and referred to *Rex* v. *Southampton Licensing Justices.* (1)

*Raikes,* for the respondents. There is a preliminary objection to the hearing of this appeal, namely, that a committee of quarter sessions sitting as the compensation authority in accordance with s. 2, sub-s. 2, of the Licensing Act, 1904 (now s. 20, sub-s. 2, of the Licensing (Consolidation) Act, 1910), and r. 27 of the Licensing Rules, 1904, for the purpose of apportioning the shares in the compensation money, has no power to state a case. That question has never been decided. It was held in *Rex* v. *Southampton Licensing Justices* (1) that the committee of quarter sessions at its principal meeting is acting judicially and therefore has power to state a case. If the committee is acting judicially it must, as was pointed out in *Dartford Brewery Co.* v. *County of London Quarter Sessions* (2), take evidence only on oath, but r. 37, which empowers the compensation authority if it thinks fit to receive evidence on oath, shews that in some cases the

(1) [1906] 1 K. B. 446. (2) [1906] 1 K. B. 695.

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compensation authority may act on unsworn testimony, and the supplemental meetings held under rr. 23, 25, and 27 appear to be the cases in which evidence on oath is not required. Applying the test laid down in the *Southampton Case* (1) and the *Dartford Case* (2), the proceedings under r. 27 are therefore not judicial proceedings, and there is consequently no power to state a case.

Secondly, on the merits, the appellants were not entitled to share in the compensation. Under s. 2 of the Act of 1904 the compensation is to be paid to the persons interested in the licensed premises. Under r. 22, if no claims are sent in (as was the case here), the persons interested are deemed to be the licensee and the registered owners of the premises. As no claims were sent in, no meeting was held under rr. 23, 24, and 25 to determine who were the persons entitled to compensation. The appellants, therefore, can only base their right to compensation on the fact that they are on the register as owners of the premises, but the mere fact of a person being registered does not of itself confer a right to be treated as a person interested in the licensed premises. He must be properly registered in respect of some interest recognized by law. Under s. 36 of the Licensing Act, 1872, the names of the owner for the time being and of the licensee are to be registered. Under s. 29 of the Act of 1874, any person possessing an estate or interest, whether as owner, lessee, or mortgagee, shall be entitled to be registered as owner. The appellants are not lessees or mortgagees, nor are they owners, for owner is defined by s. 74 of the Act of 1872 to mean the person entitled to receive either on his own account or as mortgagee or other incumbrancer in possession the rack rent of the premises. The appellants were therefore improperly on the register, and the committee rightly held that they were not owners and consequently were not entitled to share in the compensation.

*Foote, K.C.*, in reply. The appellants were rightly on the register as they are "owners" within the definition in s. 29 of the Act of 1874 (which section is re-enacted in s. 51 of the Act of 1910). That section overrides the definition of owner in s. 74 of the Act of 1872.

(1) [1906] 1 K. B. 446. (2) [1906] 1 K. B. 695.

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LORD ALVERSTONE C.J. The first contention raised on behalf of the respondents in this case is one of some importance. It is said that the committee of quarter sessions, when holding a supplemental meeting for the purpose of deciding how the compensation money is to be apportioned between the various persons interested in the licensed premises, is not acting judicially and therefore has no power to state a case for the opinion of this Court. Sect. 2, sub-s. 2, of the Licensing Act, 1904, provides that the amount to be paid as compensation "shall be divided amongst the persons interested in the licensed premises (including the holder of the licence) in such shares as may be determined by quarter sessions." I wholly fail to understand how it can be successfully contended that when an agreed or ascertained sum of money is to be divided between certain people, whose interests are or may be hostile, the determination of the amount to be apportioned in respect of each interest can be anything but a judicial decision; and the fact that under sub-s. 3 of s. 2 the question of the apportionment may be referred to the county court seems to me strongly to support the view that it is a judicial decision. In any case there is nothing in the language of the Act itself to indicate that the question has to be determined by quarter sessions otherwise than as a Court of law. Counsel for the respondents has based an argument on r. 37, which gives the compensation authority power, to such extent as they think fit, to require any evidence given before them at any meeting held under the rules to be given on oath, and he ingeniously contends that as they have power to receive evidence not on oath they cannot be acting judicially. That is really the same question as was raised and determined in the *Southampton Case* (1) and *Dartford Case* (2), where it was pointed out that, whatever might be the powers of the compensation authority as to obtaining information not upon oath, when the authority is acting judicially the evidence given before it must be on oath. The meaning which Mr. Raikes seeks to give to r. 37 is, therefore, one which is inconsistent with the previous decisions of this Court, and in my opinion there is no ground whatever for suggesting that the determination under s. 2 of the question of the

(1) [1906] 1 K. B. 446. (2) [1906] 1 K. B. 695.

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Lord Alverstone C.J.

apportionment of the compensation money between the persons interested in the licensed premises is not a judicial decision.

Secondly it is contended that the appellants are not entitled to share in the compensation money at all, on the ground that they are not the owners of, and are therefore not persons interested in, the licensed premises. I will deal with Mr. Raikes's argument in a moment, but I doubt whether the case was intended to raise any other question than that which the justices actually decided, namely, that the appellants are not the owners of the premises in question. I do not understand how that decision was arrived at. The appellants are lords of the manor and the owners of the freehold of and in all the copyhold land within the manor, including that on which these licensed premises are situate. The respondents the trustees are their copyhold tenants, and hold as lessees under them, and the appellants are entitled to certain fines on the admittance of a tenant on death or alienation. It is the ordinary case of owner and tenant, and it makes no difference from the legal point of view, except possibly as to quantum, that the appellants are lords of the manor and the respondents hold the premises as tenants by copy of court roll. The appellants are in fact registered as owners of the premises. It is contended that their names are wrongly on the register, but I can see no ground for that contention. I think the argument for the appellants is sound, that they were persons who possessed an estate or interest in premises licensed for the sale of intoxicating liquors, whether as owners or lessees or mortgagees. As I have said, I doubt whether the case really raises this question as to the appellants being improperly on the register, because under the rules the compensation authority has power to include in the persons entitled to compensation persons who are not legal owners but who send in claims which are decided to be well founded. Therefore, even if the appellants were not the registered owners, they would have been entitled to put forward a claim for compensation on which the compensation authority would have had to adjudicate. In my opinion, however, the appellants were rightly registered as owners and were entitled to compensation. I therefore come to the conclusion that the decision of the committee of quarter sessions was wrong. The

appeal will be allowed, and the case must be remitted to the committee to make any order that may be necessary in the circumstances.

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LAWRANCE J. I entirely agree.

DARLING J. I am of the same opinion.

*Appeal allowed.*

Solicitor for appellants: *F. A. Manley.*
Solicitor for respondents: *G. Passingham, Hitchin.*

F. O. R.

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FORRESTER, PETITIONER *v.* NORTON, RESPONDENT.

1911
*July* 12.

*Municipal Corporation — Election — Mayor and Alderman — Qualification — "Being a councillor" — Interest in Contract with Council — Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 12, 14, 15, 73.

The Municipal Corporations Act, 1882, s. 14, sub-s. 3, provides that "a person shall not be qualified to be elected or to be an alderman unless he is a councillor or qualified to be a councillor"; and by s. 15, sub-s. 1, "the mayor shall be a fit person elected by the council from among the aldermen or councillors or persons qualified to be such." By s. 12, sub-s. 1, "a person shall be disqualified for being elected and for being a councillor if and while he . . . . (*c*) has . . . . any interest in any contract . . . . with . . . . the council."

The respondent, who had been a member of the council of a borough since before 1897, was on November 1, 1909, re-elected a councillor. The respondent was at that date, and continued to be until January 3, 1911, interested in a contract with the council of the borough. On November 9, 1910, the respondent was elected alderman and mayor of the borough:—

*Held*, that as the respondent's election as councillor on November 1, 1909, had not been called in question within twelve months after the election, it must under s. 73 of the Act be deemed to have been a good and valid election; that his continued interest in the contract did not ipso facto vacate his office of councillor, though it rendered him liable to penalties under s. 41 and possibly to be ousted by a writ of quo warranto; that the respondent was therefore a councillor at the date of his election as alderman and mayor and was not disqualified from election to those offices.

SPECIAL CASE stated in a municipal election petition.

The respondent, who had been a member of the council of the

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FORRESTER v. NORTON.

borough of Shaftesbury since before 1897, was on November 1, 1909, re-elected a councillor. The respondent was at that date interested in a contract entered into by him with the council for the removal of road scrapings. The contract continued in operation until January 3, 1911, when it was determined by the respondent. On November 9, 1910, the respondent was elected alderman and mayor of the borough.

The question for the opinion of the Court was whether the respondent was disqualified from being elected alderman and mayor of the borough at the time of his election to those offices. (1)

*Willoughby Williams*, for the petitioner. The question whether the respondent was qualified to be elected alderman on November 9, 1910, depends on whether he was "a councillor or qualified to be a councillor" within s. 14, sub-s. 3, of the Municipal Corporations Act, 1882. He was not qualified to be a councillor at that date because his interest in the contract with the council disqualified him under s. 12, sub-s. 1 (*c*); nor was he a "councillor" within s. 14, sub-s. 3, for though he was a de facto councillor he was by reason of the contract not qualified to hold that office. The same argument applies to his election as mayor. He was not a councillor or person qualified

(1) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 12:

"(1.) A person shall be disqualified for being elected and for being a councillor, if and while he—

"(*c*) has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council."

Sect. 14: "(3.) A person shall not be qualified to be elected or to be an alderman unless he is a councillor or qualified to be a councillor."

Sect. 15: "(1.) The mayor shall be a fit person elected by the council from among the aldermen or councillors or persons qualified to be such."

Sect. 41: "(1.) If any person acts in a corporate office without having made the declaration by this Act required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, or after becoming disqualified, he shall for each offence be liable to a fine not exceeding fifty pounds recoverable by action."

Sect. 73: "Every municipal election not called in question within twelve months after the election, either by election petition or by information in the nature of a quo warranto, shall be deemed to have been to all intents a good and valid election."

to be such within s. 15, sub-s. 1. [He referred to *Le Feuvre* v. *Lankester*. (1)]

*Dickens*, *K.C.*, and *Graham Trapnell*, for the respondent. The respondent's election as alderman and mayor took place more than twelve months after he had been elected councillor. His election as councillor had never been called in question, and, therefore, under s. 73 it must be deemed to have been to all intents a good and valid election. The respondent may have been liable to penalties under s. 41 for acting as councillor when he was disqualified owing to his interest in a contract with the council, but s. 12, sub-s. 1 (*c*), only disqualified him from "being," that is to say from acting as, a councillor. Under s. 12 an interest in a contract disqualifies a person from acting as a councillor so long as the interest continues, but it does not ipso facto vacate the office, as happens in the case of bankruptcy under s. 39. The respondent was, therefore, still a councillor within s. 14, sub-s. 3, and s. 15, sub-s. 1, at the date of his election as alderman and mayor, and his election to those offices was valid. [*De Souza* v. *Cobden* (2) was referred to.]

*Willoughby Williams* in reply. The argument that at the time of the respondent's election as alderman and mayor he was irremovable from the office of councillor is answered by the decision in *Rex* v. *Beer* (3), which shews that he could have been got rid of by quo warranto. Sect. 73 only applies to disqualification for election; it does not apply to disqualification from "being," that is, from holding office after election.

CHANNELL J. This case is one which gives me some little difficulty. The first question we have to consider is as to the respondent's qualification to be a councillor. Sect. 12, sub-s. 1, of the Municipal Corporations Act, 1882, provides that "a person shall be disqualified for being elected and for being a councillor if and while he . . . . (*c*) has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council." Mr. Dickens asks us to read that as if the words "for being" were "for

(1) (1854) 3 E. & B. 530. (2) [1891] 1 Q. B. 687.
(3) [1903] 2 K. B. 693.

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Channell J.

acting" as a councillor. I do not think we can go quite so far as that, though I quite agree that that is the practical effect of it. If a person is adjudged bankrupt whilst holding the office of councillor, s. 39 of the Act of 1882 provides that he shall thereupon become disqualified and shall cease to hold the office and the council shall forthwith declare the office to be vacant. There is no similar provision in the Act with regard to the disqualification resulting from a councillor being interested in a contract with the council, but under s. 41 he becomes liable to penalties for acting as councillor whilst disqualified. I am unable to go the full length of Mr. Dickens's argument, because I think it follows from the decision in *Rex* v. *Beer* (1) that the word "being" in s. 12 means "holding the office of," for it was said by Lord Alverstone C.J. in that case that the word "holding" in s. 32 of the Bankruptcy Act, 1883, is equivalent to the word "being" in s. 12 of the Municipal Corporations Act, 1882. The qualification for an alderman is dealt with in s. 14, sub-s. 3, which says that "a person shall not be qualified to be elected or to be an alderman unless he is a councillor or qualified to be a councillor." The language of s. 15, sub-s. 1, which deals with the qualification of a mayor, is substantially the same. The question is what does s. 14, sub-s. 3, mean? It is conceded that the respondent had in fact been elected a councillor more than a year before his election as alderman and mayor, and his election as councillor had not been called in question, and therefore under s. 73 it must be deemed to have been a good and valid election to the office of councillor. But although the respondent's election as councillor could not after the expiration of twelve months be called in question, yet, holding the view as I do that the words "being a councillor" in s. 12 mean "holding the office of councillor," it seems to me that he could have been ousted from that office by a quo warranto for continuing to hold office by acting as councillor during the time he had the contract with the council. It is to be observed, however, that an interest in a contract with the council is only a temporary disqualification, for s. 12 says that it is only while the councillor is interested in the contract that he is disqualified. The contract in which the

(1) [1903] 2 K. B. 693.

respondent was interested was a continuing one, but it was one which he could put an end to at any time, and, therefore, it was only a temporary disqualification. The respondent was, therefore, in the position of being a de facto councillor and one who filled the office, because a mandamus would not go to elect another councillor to his office, notwithstanding that he might possibly have been ousted from his office by quo warranto by reason of his temporary disqualification. In these circumstances it is in my opinion impossible to say that he was not a councillor within s. 14, sub-s. 3, at the date of his election to the office of alderman. Mr. Willoughby Williams contends that that section means a qualified councillor or qualified to be a councillor. But if in point of fact a man is a councillor and the office is full, though he may be liable to be ousted from it by quo warranto, it is difficult to say that he is not a councillor within s. 14. I must not, however, be understood to say that all de facto councillors are councillors within that section; for example, I do not think an unqualified person who was elected councillor on November 1 and who was elected alderman on November 9 would be within the section. That point, however, must remain open. I base my decision on the special facts of this case and particularly on the fact that the respondent was an elected councillor and that under s. 73 his election cannot now be questioned. He had therefore, in my opinion, a sufficient qualification to render him eligible for election as alderman and mayor, and this petition must consequently be dismissed.

BANKES J. I agree. The only question which we have to consider on this petition is whether the respondent was duly elected alderman and mayor. [The learned judge read s. 14, sub-s. 3, of the Municipal Corporations Act, 1882.] I have no doubt that the words "qualified to be a councillor" were inserted to include the case of a person who has never been elected as a councillor but who is in fact qualified to be elected. The question in this case turns on the meaning of the word "councillor" in s. 14, sub-s. 3. The case of a person who may not have been properly elected but who has in fact held office for more than twelve months is dealt with in s. 73, which provides that every municipal election

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not called in question within twelve months after the election shall be deemed to have been to all intents a good and valid election. Having regard to the fact that the respondent was elected a councillor more than twelve months before he was elected alderman and mayor, it is in my opinion impossible to say he was not at the time of his election as alderman and mayor a councillor within s. 14, sub-s. 3, for he was a person whose election as councillor was under s. 73 deemed to be a good and valid election.

I desire to confine my decision to the facts of this particular case. There may be a question whether a person who has been elected councillor and is a de facto councillor but who has only served in that office for a few days is a councillor within s. 14 if he is in fact disqualified from being a councillor, and I should wish to reserve my decision on any such case. But having regard to the peculiar position of the respondent it cannot be said he is not a councillor within s. 14, and his election as alderman and mayor was therefore valid.

*Petition dismissed.*

Solicitors for petitioner: *Busk, Mellor & Norris, for Burridge, Kent & Forrester, Shaftesbury.*

Solicitor for respondent: *W. W. Box, for R. M. Hall, Salisbury.*

F. O. R.

THOMAS, LIMITED, Appellants *v.* HOUGHTON, Respondent. 1911 *July* 25.

*Adulteration—Limit of Time for taking Proceedings—Continuing Warranty—Subsequent Delivery—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 20—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 20, *sub-s.* 6.

On August 9, 1910, the appellants, a firm of wholesale milk dealers, agreed to supply to a firm of retailers all the milk which they might require at one of their branches, and on the same date the appellants gave a written warranty as to the quality of all the milk which might thereafter be supplied by them to the retailers. On January 17, 1911, the appellants supplied milk under the contract which was not in accordance with the warranty, and on February 15, 1911, an information was laid charging the appellants with an offence under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899 :—

*Held*, that the six months within which the information had to be laid ran from January 17, 1911, and that the proceedings were, therefore, commenced in time.

Case stated by justices for the county of Surrey.

On February 15, 1911, an information was laid under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899 (1), by the respondent for that the appellants on January 17, 1911, at the parish of Mortlake in the county of Surrey did unlawfully in respect of a certain article of food, to wit, milk sold by them to Handsleys, Limited, give a false warranty in writing contrary to the said section.

On the hearing of the information the following facts were proved or admitted :—

On August 9, 1910, the appellants, who were wholesale milk dealers, agreed to supply to Handsleys, Limited, who were retailers of milk, all the milk which they might require at their Putney

(1) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20, sub-s. 6 : "Every person who, in respect of an article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing, shall be liable on summary conviction, for the first offence, to a fine not exceeding twenty pounds, for the second offence to a fine not exceeding fifty pounds, and for any subsequent offence to a fine not exceeding one hundred pounds, unless he proves to the satisfaction of the Court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true."

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branch, and at the same time gave to Handsleys, Limited, the following warranty in writing:—

"245, Lavender Hill,
"London, S.W.,
"August 9th, 1910.

"Dear Sirs,

"As requested by you and for the purposes of the Sale of Food and Drugs Act, 1875 to 1907, we hereby guarantee and warrant that all new milk which may hereafter be supplied by us to you shall be pure new milk with all its cream as yielded by the cow and unadulterated.

"Yours faithfully,
"Thomas Limited,
"Thomas Oliver, Director.

"Messrs. Handsleys Ltd.,
"2, Stannary Street,
"Kennington, S.E."

On January 17, 1911, Handsleys, Limited, received from the appellants at their Putney branch eighty-nine gallons of milk accompanied by a delivery note, of which the following is a copy:—

"Messrs. Handsleys Ltd.
January 17th, 1911.

Please receive milk

"From Thomas Ltd.
"Wholesale Milk and
Cream Contractor

Morn. . 89 gals.

"Chief office
"245 Lavender Hill S.W."

Aftern. .

Total .

On the same day Thomas James, a servant of Handsleys, Limited, in the ordinary course of his employment sold, for the purpose of analysis by the public analyst, to Archibald Edgar James, a duly appointed assistant inspector under the Sale of Food and Drugs Acts, acting under the authority of the respondent, a pint of the said milk, which was divided by Archibald Edgar James

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into three parts, and one portion was sent to the county analyst; all the requirements of s. 14 of the Sale of Food and Drugs Act, 1875, were complied with.

The pint of milk was, when so sold by Thomas James as aforesaid, in the same state as when received by Handsleys, Limited, from the appellants, and on being analysed by the public analyst was found to contain 6 per cent. of added water.

The fact that the pint of milk was not pure new milk with all its cream as yielded by the cow and unadulterated was not disputed by the appellants, nor was any evidence offered on their behalf in answer to the complaint, but it was objected that no conviction could take place because (*a*) mens rea was a necessary ingredient of the offence and a limited company was incapable of entertaining mens rea; (*b*) the warranty was given on August 9, 1910, and not on January 17, 1911, and therefore the information which was laid on February 15, 1911, was too late by virtue of s. 20 of the Sale of Food and Drugs Act, 1875 (1), and s. 11 of the Summary Jurisdiction Act, 1848.

The justices were of opinion that mens rea was not a necessary ingredient of the offence, and that the false warranty must be deemed to have been given on January 17, 1911, the day on which Handsleys, Limited, received from the appellants the eighty-nine gallons of milk, and the justices therefore overruled both objections and convicted the appellants of the offence alleged against them.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law, and, if not, what should be done in the premises.

(1) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 20: "... Every penalty imposed by this Act shall be recovered in England in the manner prescribed by the eleventh and twelfth of Victoria, chapter forty-three ..."

Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11: "And be it enacted, that in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

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*Drysdale Woodcock*, for the appellants. The justices were wrong in law in holding that the information was laid in time. The appellants were charged under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, with giving a false warranty. The warranty was given on August 9, 1910, and the decision in *Whitaker* v. *Pomfret* (1) shews that in order to comply with s. 20 of the Sale of Food and Drugs Act, 1875, and s. 11 of the Summary Jurisdiction Act, 1848, the information must be laid within six months of that date. In civil proceedings this warranty might possibly be held to constitute a continuing warranty, but the statute in question being a penal statute cannot be so construed as to include a case which although within the mischief aimed at is not covered by the language used: *Proctor* v. *Manwaring* (2), per Abbott C.J.; and there is nothing in this Act about continuing warranties.

It must be admitted that the justices rightly held that mens rea is not a necessary ingredient of the offence. [*Draper* v. *Newnham* (3) and *Watts* v. *Stevens* (4) were also referred to.]

*Cecil Whiteley*, for the respondent. The offence with which the appellants were charged was the giving of a false warranty in respect of an article of food sold by them. It is true that the warranty was first given on August 9, 1910, but it applied to all future deliveries, and it did not become a false warranty until a particular defective consignment of milk was supplied. The offence was committed on January 17, 1911, and the proceedings were therefore in time. It has never been suggested that this was not a good warranty within the Act, and *Evans* v. *Weatheritt* (5) shews that a warranty relating to future deliveries may be relied on by the retailer as a defence under s. 25 of the Act of 1875. It cannot, therefore, be successfully contended by the appellants that they did not give a false warranty on January 17, 1911, in respect of the milk supplied by them on that day. *Whitaker* v. *Pomfret* (1) is clearly distinguishable, for there the warranty was given on the same day as the sale in respect of one consignment of a particular non-perishable article. The information was laid

(1) [1902] 1 K. B. 661.
(2) (1819) 3 B. & Ald. 145.
(3) (1910) 102 L. T. 280.
(4) [1906] 2 K. B. 323.
(5) [1907] 2 K. B. 80.

more than six months after the date of the sale and warranty, and the proceedings were, therefore, clearly out of time. That decision has no application to a case of a continuing warranty relating to future deliveries. If the appellants' contention were sound it would follow that after the expiration of six months from the date when the continuing warranty was originally given the vendor could never be convicted although every subsequent consignment of milk was defective.

*Drysdale Woodcock* in reply. A warranty given on one day cannot be said to be constructively given on every subsequent day on which the milk is delivered.

LORD ALVERSTONE C.J. It is most important in deciding these cases to confine one's attention strictly to the questions raised by the case, and I desire to express no opinion as to whether it was proved in this case that there was a sufficient connection between the warranty given on August 9, 1910, and the particular consignment of milk delivered on January 17, 1911, for that point is not raised in the case; nor do I want it to be supposed that, even if the respondent had failed to prove a sufficient connection, it necessarily follows that the appellants had committed no offence.

The questions on which the justices have asked the opinion of this Court are, first, whether mens rea is a necessary ingredient of the offence with which the appellants were charged. The authorities on that point are conclusive against the appellants' contention, and their counsel has very properly abandoned it. The second question, and the real point which we have to decide, is, Can a person who agrees to supply all the milk which a retailer may require, and who at the same time gives a written warranty as to the quality of all milk thereafter to be supplied by him under that agreement, be convicted of an offence under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, if he delivers a particular consignment of milk which is not in accordance with the warranty, and the information is not laid until more than six months after the warranty was given? The answer to that question appears to me to depend on the terms of the warranty. [The Lord Chief Justice read the warranty

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as set out in the case, and continued:] I only refer to the case of *Draper* v. *Newnham* (1), which was mentioned in the course of the arguments, because in that case a document in almost the same terms and to the same effect as this warranty was held to constitute a continuing warranty. It would in my opinion be a very serious matter if after six months from the date of the warranty the vendor was immune from all proceedings. Suppose a warranty were on its face expressed to be for a definite period, say for nine months, Mr. Woodcock admits that he would in that case contend that the liability to proceedings ceased after six months. The warranty in this case applies to all future deliveries of milk and is clearly, therefore, a continuing warranty, and in my opinion, when you have a continuing warranty, the time within which the proceedings under s. 20, sub-s. 6, of the Act of 1899 must be taken runs from the date on which the particular consignment is supplied which is not in accordance with the warranty, for the warranty must be deemed to be given on each day on which the milk to which it applies is supplied. I am, therefore, of opinion that the information in this case was laid in time, and this appeal must be dismissed.

LAWRANCE J. I entirely agree.

DARLING J. I am of the same opinion. I only wish to say for myself that instead of using the expression a continuing warranty I prefer to call it a completed warranty. My view is that each time the warranty applies to a consignment to which it was intended to apply the delivery of the milk to the purchaser constitutes a repetition of the original warranty. I think one may treat it as a kind of echo; the warranty once given is repeated from point to point as the milk to which it applies comes in its way.

To decide otherwise would be to deprive the vendor of the protection afforded him by the latter part of sub-s. 6 of s. 20, which entitles him to be acquitted if he proves to the satisfaction of the Court that when he gave the warranty he had reason to

(1) 102 L. T. 280.

believe that the statements therein were true. It can only be decided that a man believed the statements in the warranty to be true by holding that at the time the goods are delivered the warranty previously written out applied. I do not forget that the vendor would not need to avail himself of that defence if one were to hold that a warranty once having been given was thereafter exhausted, but that contention cannot prevail because of the decision in *Draper* v. *Newnham*. (1)

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Darling J.

*Appeal dismissed.*

Solicitor for appellants: *Charles May.*

Solicitors for respondent: *Wyatt & Co., for T. W. Weeding, Kingston-on-Thames.*

F. O. R.

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[IN THE COURT OF APPEAL.]

C. A.

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*July* 13, 17, 29.

## BATT *v.* METROPOLITAN WATER BOARD.

*London — Waterworks — Communication Pipe — Stop-cock Box—Liability of Householder to repair—Power to break up Street for that Purpose—Metropolitan Water Board (Charges) Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 19.

The provision of the Metropolitan Water Board (Charges) Act, 1907, s. 8, which imposes on the owner or occupier of a house requiring a supply of water from the Metropolitan Water Board the duty of maintaining the communication pipe and apparatus necessary for the purposes of such supply, applies in the case of a communication pipe and apparatus already laid down at the date of, as well as in the case of such a pipe and apparatus laid down after, the coming into operation of the above-mentioned Act.

Accordingly, where a person passing along a street within the limits of supply of the Metropolitan Water Board sustained injury through non-repair of a stop-cock box which had been placed in the pavement in connection with a communication pipe before the coming into operation of the above-mentioned Act:—

*Held*, reversing the decision of a Divisional Court (2), that the Metropolitan Water Board was not liable in respect of the non-repair of the stop-cock box.

APPEAL from the judgment of a Divisional Court (Ridley J. and Avory J.) on an appeal from the Westminster County Court. (2)

(1) 102 L. T. 280. (2) [1911] 1 K. B. 845.

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The plaintiff, Florence Batt, while walking along a certain highway called Amery Place, near the Old Kent Road, caught her foot in a stop-cock box in consequence of its defective condition, as hereinafter described, and fell, thereby sustaining injury. The box in question was used in connection with a communication pipe through which water was supplied to a house, No. 17, Amery Place, by the defendants, and contained the spindle by which the supply of water to the house could be regulated. The box was situate in the pavement about one foot from the exterior wall of No. 17, Amery Place, and about ten feet from the defendants' main. It had been there for some years, but there was no evidence as to when it was put there, or by whom. It had originally been fitted with a lid, which, however, had disappeared. The result of the absence of the lid was that an unprotected hole was left in the pavement, measuring about four inches square by six inches deep. There was evidence that the communication pipe and the stop-cock box were the property of the owner or occupier of the adjoining house. There was nothing to shew that, in order to remedy the defect in the box, it would have been necessary to open the road. The defendants contended that the obligation to repair the stop-cock box did not rest upon them, for that, even if it had been so previously to 1907, it had by reason of s. 8 of the Metropolitan Water Board (Charges) Act, 1907, been transferred to the owner or occupier of No. 17, Amery Place, for the purpose of the supply of water to which house alone the box was used. The county court judge held that the section applied to communication pipes and apparatus in connection therewith already laid at the time when the Act came into operation as well as to such pipes and apparatus thereafter to be laid. He accordingly gave judgment for the defendants. On appeal the Divisional Court reversed his judgment. (1)

*C. A. Russell, K.C.* (*Ulick Bourke* with him), for the defendants. The decision in *Chapman* v. *Fylde Waterworks Co.* (2), which was relied upon by the plaintiff in the Court below, does not govern the present case for the following reasons. First, the

(1) See [1911] 1 K. B. 850. (2) [1894] 2 Q. B. 599.

main ground of the decision in that case was that the apparatus could not be repaired without breaking up the pavement, which the owner of the house had no power to do. This was not shewn to be necessary in the present case. Secondly, the locus in quo in that case was not within the metropolitan area, and neither the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), nor the Metropolitan Water Board (Charges) Act, 1907, applied there. It is contended that, independently of the provisions of s. 8 of the Metropolitan Water Board (Charges) Act, 1907, under the Metropolis Water Act, 1871, the duty of keeping this stop-cock box in repair was imposed upon the owner or occupier of the adjoining house. Sect. 28 of that Act imposes upon the owner or occupier of a house supplied with water the duty of keeping in repair the fittings prescribed under the authority of that Act for the purpose of preventing the waste of water. By s. 3 the term "fittings" includes communication pipes, and also all pipes, cocks, cisterns, and other apparatus used or intended for supply of water by a company to a consumer, and for that purpose placed in or about the premises of the consumer. By s. 17 it is provided that every metropolitan water company shall make regulations for the purposes for which regulations may be made under the authority of s. 26 of the Metropolis Water Act, 1852. The regulations under that section may prescribe, among other things, the size, nature, and strength of the pipes, cocks, cisterns, and other apparatus to be used. By s. 32 of the Metropolis Water Act, 1871, the person supplied with water is made liable to a penalty if he wilfully or negligently suffers any fittings to be out of repair. Assuming that a fitting was laid down before 1871, it might none the less be a fitting within the Metropolis Water Act, 1871, if it was of the description prescribed under that Act. This stop-cock box, therefore, which was a fitting placed "about the premises of the consumer," being only a foot from the external wall of those premises, was one which the consumer, and not the Water Board, was bound to repair.

But, whether the Act of 1871 imposed the duty of repairing this stop-cock box on the householder or not, it is contended that clearly s. 8 of the Metropolitan Water Board (Charges)

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Act, 1907, does so. That section applies to all communication pipes and apparatus, whether already laid down when the Act came into operation, or to be thereafter laid down. The words "to be" in the section, upon which the plaintiff relies, do not necessarily indicate future time. If no part of the section applies to pipes laid down before 1907, the Board will have no power to charge any water rates except in the case of houses supplied with water for the first time after that date; for by s. 6 the whole of the charging sections in the special Acts of the water companies whose undertakings were taken over by the Board are repealed, and the only charging section enacted in their place is s. 8. Again one of the objects of the Act of 1907 was to provide for a uniform rate of charge throughout the metropolis, and presumably therefore the intention was that water should be supplied to all consumers on the same terms as to liability; but, if the contention for the plaintiff is right, that intention would be frustrated, because some consumers would be supplied with water at the specified rate, the Board being liable for the repair of the communication pipe and apparatus, and others would be supplied at the specified rate on the footing that they must themselves do such repair. [He also cited *Grand Junction Waterworks Co.* v. *Rodocanachi* (1) and *Sheffield Waterworks Co.* v. *Wilkinson*. (2)]

*Simner*, for the plaintiff. Before 1907, according to the decision of the Court of Appeal in *Chapman* v. *Fylde Waterworks Co.* (3), the owner of a house supplied with water through a communication pipe was under no obligation to keep the pipe, or a stop-cock box in the pavement connected with it, such as that in question, in a state of repair, even though the pipe or the box was his property. The obligation to keep such a box in repair lay upon the water company, for they alone had power to interfere with the surface of the street for the purpose of effecting such repair. Subject to the question whether s. 8 of the Act of 1907 applies to communication pipes already existing when that Act came into operation, the decision in *Chapman* v. *Fylde Waterworks Co.* (3) is applicable here, and the provisions

(1) [1904] 2 K. B. 230. (2) (1879) 4 C. P. D. 410.
(3) [1894] 2 Q. B. 599.

of the Metropolis Water Act, 1871, do not differentiate that case from the present case. This stop-cock box does not come within the definition of "fittings" given by that Act. It was placed in the pavement, and not "in or about the premises of the consumer." The expression "about the premises of the consumer" does not apply to a fitting placed in the public street; it means somewhere in the curtilage of the consumer's premises, e.g., in his garden. The stop-cock box was not placed in the street for the benefit of the consumer but for the benefit of the water company, who alone had power to place it there, and to interfere with it for the purposes of repair. The house owner has power under the group of sections 48—52 of the Waterworks Clauses Act, 1847, to break up the pavement for the purpose of laying a communication pipe or removing it, but not for the purpose of repairing it. The consumer so breaking up the street must under s. 52 reinstate the surface as it was before. He has no authority to place any structure in the surface so as permanently to alter it. The water company alone had power to place this stop-cock box in the pavement, and to repair it when necessary. In *Grand Junction Waterworks Co.* v. *Rodocanachi* (1) the company, who were calling upon the householder to repair the communication pipe under s. 28 of the Metropolis Water Act, 1871, had themselves opened the ground down to the pipe, and therefore no question arose as to the power of the house owner to break open the pavement. There is nothing in that case to shew that the decision in *Chapman* v. *Fylde Waterworks Co.* (2) does not apply to the metropolis.

Sect. 8 of the Act of 1907 does not apply to the case of a stop-cock box already laid down when the Act came into operation, for all the language of that section is plainly prospective in its character, and not retrospective. It can only apply to houses not already supplied with water when the Act came into operation. It provides that the supply shall upon the request of the owner or occupier be furnished through a communication pipe which with the necessary apparatus is "to be provided and laid down and maintained" by the owner or occupier. It is a well-known principle of construction that a

(1) [1904] 2 K. B. 230. (2) [1894] 2 Q. B. 599.

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statute ought not to be construed so as to give it a retrospective operation, unless the words are so absolutely clear as to compel the Court so to construe it.

[BUCKLEY L.J. The operation of a statute is correctly said to be retrospective when it enacts that something which was not the law at a date anterior to its passing shall be treated as having been the law at that date. An enactment which provides that in future the liability to repair certain existing pipes shall rest upon certain persons upon whom it did not rest before is not retrospective in that sense.]

Admitting that to be so, it is submitted that, in the absence of clearer words than those of s. 8, the presumption is against the inference that the Legislature intended to make such an extensive transfer of rights and liabilities as would be involved by the construction of the section contended for by the defendants.

*C. A. Russell, K.C.*, for the defendants, in reply.

*Cur. adv. vult.*

July 29. The following judgments were read :—

VAUGHAN WILLIAMS L.J. I have come to the conclusion, reluctantly, that s. 8 of the Act of 1907, and indeed the whole Act, applies to all existing service pipes as well as to pipes thereafter to come into existence on the request to be made in the future by the owner or occupier of a house in the metropolis. I am not saying that the Act of 1907 is retrospective, but that it applies to existing service pipes as well as to pipes and their fittings thereafter to come into existence on requests to be made by owners or occupiers. The words of s. 8 are no doubt capable of a construction which would limit the operation of the Act to service pipes thereafter to come into existence, but such a construction would be inconsistent with the declared object of the Act, which is described as "An Act to provide for uniform scales of charges for water applicable throughout the limits of supply of the Metropolitan Water Board and for other purposes."

I have said that I come to the conclusion to which I have come as regards the obligation to repair stop-cocks on the pavement, i.e., the highway, reluctantly ; that is because the duty

would be much more conveniently and efficiently performed by the Water Board or the road authority. The Water Board undoubtedly have by statute the power to repair the stop-cocks and other fittings of the service pipes: see s. 28 of the Act of 1847, and also s. 21 of the special Act, and the judgments in *Chapman* v. *Fylde Waterworks Co.* (1); but in respect of such service pipes as are intended to be covered by s. 8 it is provided that the owner or occupier shall be liable to execute necessary repairs, and to that extent the application of *Chapman* v. *Fylde Waterworks Co.* (1) is excluded.

I believe myself that the statute of 1871 was enacted on the basis that the liability to maintain and repair service pipes of the owner or occupier of the house for whose benefit the service pipe was laid down was limited to the pipe and fittings in or about the premises for the benefit of which the communication between the main and the house was made, and did not extend to so much of the service pipe as was laid beneath the highway unless the owner or occupier laid down such pipes himself, which such owner or occupier had power to do under s. 52 of the Act of 1847, subject to giving the same notices to the persons under whose control the street is as are provided by s. 30 of the Act of 1847 in a case in which the undertakers break up the street, i.e., when they lay down the service pipes.

There is no evidence in this case who laid down the service pipe. I think the onus lay upon the plaintiff to shew that the Water Board or their predecessors did so. But I cannot think that the Legislature recognized that, in passing s. 19 of the Act of 1907, and giving the occupiers of the houses the doubtful privilege of breaking up the highway for the purpose of repair of service pipes and stop-cocks, it was transferring the whole liability of maintenance to the owners or occupiers of the houses supplied with water.

It occurred to me at one time that possibly some division between fittings in or about the premises of the consumer and those outside the premises might be found in s. 3 of the Act of 1871, but, although neither the Act of 1871 nor the Waterworks Clauses Act, 1863, is repealed by the Act of 1907, it is

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very difficult to limit by the definition in s. 3 of the Act of 1871 the words "necessary and proper apparatus" in s. 8 of the Act of 1907, if that section is held to apply to service pipes laid down before the passing of the Act of 1907. The words of definition in s. 3 of the Act of 1871 run thus: "The term 'fittings' includes communication pipes, and also all pipes, cocks, cisterns, and other apparatus used or intended for supply of water by a company to a consumer, and for that purpose placed in or about the premises of the consumer." Moreover, s. 19 of the Act of 1907 shews that the Legislature intended to confer on the owner or occupier of the house supplied with water the power to break up the pavement for the purpose of repairing fittings of the service pipes, and thus removed the ground on which the Court of Appeal in *Chapman* v. *Fylde Waterworks Co.* (1) held the owner not liable to repair but left untouched the liability of the water company.

This appeal must be allowed with costs.

FLETCHER MOULTON L.J. This appeal is from a decision of the Divisional Court, reversing a judgment of the Westminster County Court in favour of the defendants, the Metropolitan Water Board, in an action brought by the plaintiff, Florence Batt, in respect of an accident due to her catching her foot in a stop-cock box placed in the pavement of a highway named Amery Place. The stop-cock in question was upon a communication pipe through which water was supplied to a house, No. 17, Amery Place, from the mains of the defendants. It had originally been fitted with a lid, which had come off and disappeared, leaving an unprotected hole in the pavement measuring about four inches square by six inches deep. On behalf of the plaintiff it was alleged that the defendants, the Metropolitan Water Board, were responsible for keeping this fitting in a proper state of repair, and that, as the accident had arisen from their neglect of their duty in this respect, they were liable to the plaintiff in respect of the personal injuries resulting therefrom. The defendants denied their responsibility in the matter.

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The fact and nature of the accident and the amount of the damages are not in dispute, so that the decision of the case must turn on the question whether or not the plaintiff has established her contention that the responsibility for the condition of the pavement fitting rests upon the Metropolitan Water Board.

Amery Place is situated within the district of the old Lambeth Waterworks Company, and, until the transfer of the metropolitan water undertakings to the Metropolitan Water Board, the water was supplied by that company under the provisions of the Lambeth Waterworks Act, 1848 (11 Vict. c. vii.), and subsequent Acts amending the same—none of which later Acts affect the question before us. The Lambeth Waterworks Act, 1848, incorporates the Waterworks Clauses Act, 1847, "except where the same shall be inconsistent with or repugnant to any of the provisions of this Act." As is well known, the Waterworks Clauses Act, 1847, was framed on the basis of continuous supply, but by s. 35 of the Lambeth Waterworks Act, 1848, this was modified in many respects. There is no evidence in the present case whether the obligation to give a continuous supply ever came into effect with regard to the locus in quo during the period when such supply would have been governed by the provisions of the Lambeth Waterworks Act, 1848. But in 1871 the important Act known as the Metropolis Water Act, 1871, was passed and made applicable to the whole of the water companies supplying the metropolis. It amended and supplemented the Metropolis Water Act, 1852, and may be said, amongst other things, to have established a code under which constant supply has since been regulated within the metropolitan district. The Metropolis Water Act, 1902, which provided for the transference of the whole of the metropolitan water undertakings to the present defendants, put them under the then existing obligations of the respective undertakings, and entitled them to make the same charges, but it also put them under an obligation to bring in a Bill within a certain stipulated time providing for a uniform scale of charges applicable throughout their limits of supply. In compliance with this obligation the Metropolitan Water Board in the year 1907 brought in a Bill dealing with charges and other matters, which became law under the title of the

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Metropolitan Water Board (Charges) Act, 1907. It is under the provisions of the three Acts to which I have referred, namely, the Lambeth Waterworks Act, 1848, incorporating with restrictions the Waterworks Clauses Act, 1847, the Metropolis Water Act, 1871, and the Metropolitan Water Board (Charges) Act, 1907, that the water supply in the locus in quo is given, and it will presently appear that it is on the interpretation to be placed on the provisions of these enactments that the decision in the present case must be based.

Before dealing with these statutory provisions it is necessary to complete the statement of facts. The stop-cock was upon the communication pipe between the defendants' mains and the house No. 17, Amery Place. It was obviously for the purpose of closing the communication when required. There was no evidence whatever by whom the stop-cock and box were fixed. An interrogatory was administered by the plaintiff to ascertain by whom the apparatus was fixed on the pavement, and when, but she was unable to get any answer that could be used against the defendants as an admission, their proper official answering with evident truthfulness that no record could be found of the fixing of the apparatus, but that he was informed that it was presumably fixed some years ago by the Lambeth Waterworks Company, in accordance with the usual practice, at the request and expense and for and on behalf of the person requiring a supply of water to the house No. 17, Amery Place. This answer merely amounts to a statement that he presumed that it had been inserted in the way pointed to by the statutory provisions relating to such matters. It had been so long in its present position that no one knew or could know anything more definite. The lid had apparently come off within the last four or five years, but, from the drawing of the apparatus which forms part of the evidence in the case, it is clear that its place could have been supplied by a block which would have its upper surface level with the pavement. When the lid was off, there was a hole in the pavement some four inches square, in the centre of which, at a depth of several inches, was to be found the upper end of the spindle of the stop-cock itself. Thus unprotected the stop-

cock box obviously constituted a danger to passers by, as was sufficiently evidenced by the accident itself.

It is not necessary to examine what would have been the rights of the parties in this case if they depended solely on the Waterworks Clauses Act, 1847, as incorporated in the Lambeth Waterworks Act, 1848. The obligations of the parties have been so profoundly modified by the Metropolis Water Act, 1871, and the Metropolitan Water Board (Charges) Act, 1907, that they may almost be said to rest solely on the provisions of those Acts. But it is well to bear in mind that the original scheme of the Waterworks Clauses Act, 1847, was that the company should lay down supply mains and maintain them, but that the communication pipes which draw off the water from the company's mains to the premises of the consumer should be laid by and remain the property of the consumer, who had the power to remove them if he no longer wished the supply to be continued. I confess that I have great difficulty in seeing how under those circumstances any duty on the part of the water company could arise to keep in repair pipes not belonging to them, and with which, so far as I can see, they had no right to interfere otherwise than, in a proper case, to cut off the communication. But there is a decision of this Court to which our attention has been called, namely, *Chapman* v. *Fylde Waterworks Co.* (1), in which it appears to have been held that, in a case where repairs would involve interference with the streets, an obligation must be inferred to rest upon the water company to repair the pipes of the consumer, because they possess general powers of interference with the street for the purpose of laying, repairing, or removing water pipes. I prefer, however, not to discuss the reasoning of that decision because it is inapplicable to the present case on two grounds. In the first place the majority of that Court based its conclusion on the fact that the repair necessitated interference with the street, and such is not the case here. In the second place the locus in quo was not situated in London, so that neither the Metropolis Water Act, 1871, nor the Metropolitan Water Board (Charges) Act, 1907, applied to the case, whereas in the present

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case the rights of the parties substantially rest wholly on the provisions of those two Acts.

Turning to the Metropolis Water Act, 1871, it is important to observe first of all that by the definition clause the term "fittings" is made to include "communication pipes and also all pipes, cocks, cisterns and other apparatus used or intended for supply of water by a company to a consumer and for that purpose placed in or about the premises of the consumer." By a group of sections entitled "Regulations" it is provided that each metropolitan water company shall make regulations for certain purposes enforceable by penalties binding upon all parties. These regulations must be confirmed by the Local Government Board. In the present case a copy of such regulations, which must have been made within six months after the passing of the Act, has been put in, and one of the regulations provides that every communication pipe for the conveyance of water to be supplied by the company into any premises shall have at or near its point of entrance, and, if desired by the consumer, within such premises, a sound and suitable stop valve of the screw-down kind of a certain size, and, if placed in the ground, such stop valve shall be protected by a proper cover and guard box. It is evident that the stop-cock in the present case is an instance of such "prescribed fitting" in the absence of which the company would have been entitled to refuse to give a supply to the premises. The question of the supply of "prescribed fittings" is dealt with in ss. 26 to 32 of the Act. It is not necessary to go into the details of these sections, but by s. 32 it is provided that "where in any district any company is required, or has proposed, to provide a constant supply,—if any person supplied with water by such company wilfully or negligently causes or suffers any fittings to be out of repair . . . . he shall for every such offence be liable to a penalty not exceeding five pounds." I have no doubt that this group of clauses throws upon the occupier the duty of repair of prescribed fittings, and accordingly inferentially gives him the necessary powers to effect such repairs. Indeed in s. 28 the duty of repair is specifically imposed on every owner or occupier of premises upon whom notice to supply the prescribed fittings has

been served, and I do not think that it is possible to conceive that the Act left a person who has provided the prescribed fittings in compliance with the general notice in the *London Gazette* in a different position as to his duties or powers of repair from that of one on whom a specific notice has been served. It is worthy of remark that regulation 33 provides that all existing fittings that shall be sound and efficient, and are not required to be moved or altered under these regulations, shall be deemed to be prescribed fittings under the Metropolis Water Act, 1871. This is only what one would have expected. It is naturally of no importance at what date the prescribed fittings have actually been provided. So soon as they are in fact provided they are all subject to the same provisions, and the owner has the same duties and liabilities with regard to them.

But the matter does not rest here. The Metropolitan Water Board (Charges) Act, 1907, repealed the clauses of the Lambeth Waterworks Act, 1848, and the other private Waterworks Acts of the metropolis which entitle consumers to a supply of water from the company. Henceforward the right to supply depends entirely on ss. 7 and 8 of that Act. Sect. 7 lays down the obligations of the Metropolitan Water Board with respect to laying mains, and does not concern us in this case. Sect. 8 reads as follows: "Subject to the provisions of this Act the Board shall at the request of the owner or occupier of any house or building or part of a house or building occupied as a separate tenement in any street within the limits of supply in which any service main or service pipe of the Board shall be laid or of any person who under the provisions of this Act shall be entitled to require a supply of water for domestic purposes furnish to such owner or occupier or other person by means of a communication pipe or communication pipes and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost a sufficient supply of water for domestic purposes at a rate per annum which shall not exceed five per centum of the rateable value of the house or building or part of a house or building in respect of which the supply is required and such rate shall subject to the provisions of this Act be charged uniformly under like circumstances to all consumers entitled to such supply."

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This lays down clearly that the provision of the communication pipe and other necessary and proper apparatus by means of which the supply is given is an obligation of the owner or occupier, and that they have to be provided and laid down and maintained by him and at his cost. To my mind this enactment is clear and explicit, and decides the question in the present case. The decision of the Divisional Court shews that the learned judges discovered a difficulty in its interpretation which I cannot understand. They take the phrase "to be provided" as applying only to pipes not existing at the date of the passing of the Act. To my mind the words "to be" in the phrase "to be provided" have no relation to futurity, but to obligation. The supply of water to which the section relates is, of course, a future one, i.e., one which takes place subsequently to the passing of the Act. That supply must from moment to moment be given through communication pipes which must be there for that purpose, and the duty of seeing that they are so there is by this section thrown upon the owner or occupier, who has to provide, lay down, and maintain them so that the supply can be duly given. But, so long as they are duly maintained so as to be in order at the moment of supply, it is obviously irrelevant to the provisions of the clause at what date the provision and laying down took place. To hold that the clause only refers to pipes physically provided and laid down subsequent to the date of the Act would be to confine the duty of the Metropolitan Water Board in giving a supply to consumers to those who put down pipes after the date of the Act, because, as I have said, all the clauses of previous Acts which gave a right to supply are repealed by this Act. Such considerations would have a strong and legitimate influence on the construction of the language of the clause if it were ambiguous. But to my mind it is not necessary to have recourse to them for the purpose. The language itself is to my mind quite unambiguous.

In order to remove doubts as to the power of the owner or occupier to repair communication pipes—a doubt which had been created by the decision of this Court in *Chapman* v. *Fylde Waterworks Co.* (1)—s. 19 was inserted, which reads as follows:—"For

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the purpose of complying with any obligation under this Act to maintain any pipe or apparatus the person liable to maintain the same shall have the like power to open the ground as is conferred upon him by sections 48 to 52 of the Waterworks Clauses Act, 1847, in relation to the laying of communication pipes." It seems to me impossible that any doubt can survive the clear terms of this section. The duty to maintain pipes under s. 8 is clearly a future one at whatever date the pipe may have been laid, and s. 19 gives the power of breaking up the streets for the purpose of that maintenance.

To sum up, therefore, I find a clear statutory obligation on the owner or occupier to maintain this stop-cock and adequate powers for so doing. It follows that he is liable for the non-repair, and I can find no obligation or duty on the part of the defendants to repair fittings not belonging to them, and no ground whatever for holding them liable for such fittings not being in a state of repair. I am, therefore, of opinion that this appeal must be allowed and the judgment of the county court judge restored, with costs here and in the Court below.

BUCKLEY L.J. There was a stop-cock box in the street which ought to have been, but was not, furnished with a lid. The plaintiff caught her foot in it, and fell, and was injured. She sued the Metropolitan Water Board for damages. The question is whether they are parties liable. The evidence is that the connection pipe in which the stop-cock box in question was fixed was the property, not of the Water Board, but of the owner or occupier of the adjoining house, and so also was the stop-cock. The learned judge did not find, and, if he did, there was no evidence to support the finding, that, in order to repair the lid, it was necessary to open the road. *Chapman* v. *Fylde Waterworks Co.* (1) was a case in which the company alone had power to break up the street, and the apparatus could not be repaired without breaking up the street. Further it was a case decided upon the Waterworks Clauses Acts, 1847 and 1863. The Metropolis Water Act, 1871, and the Metropolitan Water Board (Charges) Act, 1907, did not in that case, but do in this case,

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apply. The decision in *Chapman* v. *Fylde Waterworks Co.* (1) therefore cannot decide this case. The county court judge decided this case upon the Act of 1907, holding that ss. 8 and 19 of that Act apply, not only to communication pipes put in after 1907, but to pipes in existence at that date. The Divisional Court reversed him upon this point. The substantial point on the appeal is as to the construction of the Act of 1907. In my opinion the pipes to which ss. 8 and 19 refer are pipes through which a supply is taken to the consumer's premises, irrespective of the date at which they were laid down. If this were not so, there would be no section of the Act under which there could be a charge made for water thus supplied. The argument of the respondent rests mainly upon the words "to be" in s. 8 in the connection "to be provided and laid down and maintained by him." These words "to be" express, in my judgment, incidence of obligation, not futurity of provision. The effect of the section is, I think, the same as if the words were "the said pipes shall be provided, if it be necessary to provide them, and shall be laid down, if it be necessary to lay them down, and shall be maintained, if it be necessary to maintain them, at the cost of the householder." The obligation of maintaining this pipe, although laid down before 1907, is, I think, upon the householder, and the defendants are not liable.

For these reasons I think this appeal should be allowed and the judgment of the county court restored, and the respondent must pay the costs in the Divisional Court and this Court.

*Appeal allowed.*

Solicitors for plaintiff: *Arnold & Cubison.*
Solicitor for defendants: *Walter Moon.*

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E. L.

*Considered.* MACDONALD *v.* GREEN [1951] 1 K. B. 594

*Discussed and Explained.* MACDONALD *v.* GREEN. [1950] 2 All E.R. 1240.

[IN THE COURT OF APPEAL.]

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## *In re* O'SHEA.

## *Ex parte* LANCASTER.

*Bankruptcy—Proof—Gaming Debt—Illegal Consideration—Guarantee to Bank to enable Debtor to pay a Lost Bet—Money paid in respect of Agreement void under the Gaming Act*, 1845 (8 & 9 *Vict. c.* 109)—*Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.

In March, 1903, L. lent the debtor 1000*l.* for the purpose of betting on horse races, any profits resulting from the betting to be equally divided. In the same year L. guaranteed an overdraft to the extent of 1000*l.* at the debtor's bank. There were no profits on the betting, and all the money having been lost, L. in September, 1903, guaranteed a further overdraft of 500*l.* in order to enable the debtor to pay bets to that amount which he had lost. In 1906 L. paid 1633*l.* to the bank under his guarantees and recovered judgment in default of defence against the debtor for 3000*l.* The debtor having failed to comply with a bankruptcy notice to pay the amount of the judgment debt, L. presented a bankruptcy petition against him. The registrar dismissed the petition on the ground that, having regard to the Gaming Acts, there was no valid debt to support it:—

*Held*, on appeal, that as to the guarantee for 500*l.* the transaction was not invalid. The debt arising out of the loan for the purpose of enabling the debtor to pay a bet which he had lost, not being for an illegal consideration, could be proved for in bankruptcy; and the money was not paid by L. "in respect of" a gaming contract within the meaning of s. 1 of the Gaming Act, 1892.

*Held*, also, that inasmuch as the guarantee was given in 1903, and the payment to the bank was not made till 1906, the banking account having been running in the interval, having regard to the rule in *Clayton's Case*, (1816) 1 Mer. 585, the original transaction, even if tainted with vice under the Gaming Acts, must be taken to have been wiped out, so that no question arose with regard to it.

*Held*, therefore, on both grounds, that there was a good debt to support the petition.

*Ex parte Pyke*, (1878) 8 Ch. D. 754, followed.

*Tatam* v. *Reeve*, [1893] 1 Q. B. 44, and *Saffery* v. *Mayer*, [1901] 1 K. B. 11, distinguished.

APPEAL from an order of the registrar dismissing a bankruptcy petition which had been presented by Mrs. Lancaster against the debtor G. H. W. O'Shea. The registrar had dismissed the petition on the ground that there was no sufficient debt to support it.

The act of bankruptcy upon which the petition was founded

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was the non-compliance with a bankruptcy notice to pay to the petitioning creditor the sum of 3019*l.* 15*s.* 5*d.* and 25*l.* 10*s.* 8*d.* taxed costs as being the amount due on a final judgment obtained against the debtor by the executors of Mr. Lancaster, the petitioning creditor's late husband. The executors had assigned the judgment debt to Mrs. Lancaster, who was beneficially entitled thereto under her husband's will.

Mr. Lancaster, who was a friend of the debtor, at his request in March, 1903, lent him 1000*l.*, upon an I.O.U., for the purpose of enabling him to make a betting book on the results of horse races. It was agreed that Lancaster should have half the profits of the betting. Shortly afterwards Lancaster guaranteed the debtor's account at the bank to the extent of 1000*l.* for the purpose of further assisting him in his business of a bookmaker.

In September, 1903, the whole of the money so advanced had been lost, and the debtor owed another bookmaker named Turner a sum of 500*l.* in respect of lost bets. On September 16, 1903, Lancaster gave a further guarantee to the bank for 500*l.* in order to enable the debtor to pay Turner, which he did on September 18, 1903.

On September 10, 1906, Lancaster paid 1633*l.* under his guarantees to the bank.

The debtor opposed the petition on the ground that the debt in respect of which the judgment had been obtained was a gaming debt upon which a bankruptcy petition could not be founded.

The registrar held on the evidence that all the money, except 15*l.*, was advanced by Lancaster and the guarantees given by him to the bank to enable the debtor to carry on his business of a bookmaker, and on an agreement that he was to receive half the profits. The case was therefore within the mischief of the Gaming Acts. The 500*l.* guaranteed in order to pay the bets lost to Turner was within the authority of *Tatam* v. *Reeve* (1), and therefore all the moneys claimed by the executors of Lancaster, except the 15*l.*, were not recoverable. He accordingly dismissed the petition, there being no sufficient debt to support it.

Against this decision Mrs. Lancaster appealed.

(1) [1893] 1 Q. B. 44.

*Clayton*, K.C., and *R. Macklin*, for the appellant. Money lent for the purpose of enabling the borrower to pay a bet which he has already lost is recoverable in the bankruptcy of the borrower: *Ex parte Pyke*. (1) No doubt money paid to the winner at the request of the loser is money "paid in respect of" a contract which is void within the Gaming Acts and cannot be recovered: Gaming Act, 1892, s. 1; but that is not this case.

Again, money lent for an immoral or illegal purpose cannot be recovered, but betting is not illegal: *Quarrier* v. *Colston*. (2) The guarantee for 500*l*. stands on a different footing to the other advances, and to the extent of 500*l*. at all events there is a good debt.

*G. M. Hilbery*, for the debtor. The bankruptcy notice is bad inasmuch as it claims payment of a sum which is not due from the debtor at all: *In re a Debtor*, 478 *of* 1908. (3)

[COZENS-HARDY M.R. The only question before us is whether a good debt is alleged in the petition.]

With respect to the 500*l*. guarantee the case is covered by *Tatam* v. *Reeve* (4) and *Saffery* v. *Mayer*. (5) Money lent for the purpose of paying a gaming debt is paid "in respect of" a gaming contract within the meaning of the Gaming Act, 1892, s. 1. There is no true distinction between "paid" and "lent" in such a case.

No reply was called for.

COZENS-HARDY M.R. This case raises a curious and important point. Mr. O'Shea is a bookmaker, and he had a friend, a Mr. Lancaster. Mr. O'Shea, so far as the facts have been stated to us, has been in an impecunious condition for the last seven or eight years. It appears that in March, 1903, Mr. Lancaster lent him 1000*l*. on an I.O.U., and accepting, as we are bound to do for the present purpose, Mr. O'Shea's evidence, which was believed by the registrar, that money was lent distinctly to enable O'Shea to make bets, and upon terms that Lancaster should have half of the profits which might be made by betting. In the same year there was a guarantee given to the bank to secure an overdraft

(1) 8 Ch. D. 754.
(2) (1842) 1 Ph. 147.
(3) [1908] 2 K. B. 684.
(4) [1893] 1 Q. B. 44.
(5) [1901] 1 K. B. 11.

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to the extent of 1000*l.* which was probably tainted with the same defect; but in September, 1903, O'Shea found himself in this position, that he owed to another bookmaker named Turner 500*l.* He had not 500*l.*, nor apparently 500 pence, to pay him. He went to Lancaster and asked him to find the money; he says "I told him I owed the money to Turner for bets. He said he would guarantee a further 500*l.* at the bank to enable me to pay the debt, and I paid Turner. This was not a loan for further betting purposes." The guarantee was given. The overdraft was allowed by the bank; Turner was paid, and some two-and-a-half years after this transaction a sum of 1633*l.* was paid by Lancaster to the bank under these two guarantees. Judgment has been obtained by Lancaster against O'Shea for a large sum, about 3000*l.* Judgment has been given in default of defence, and it is in respect of that judgment debt that the bankruptcy notice has been given. The point was then taken before the learned registrar that there was an objection to it, and O'Shea was required to state what his objection was. He said "I intend to oppose the making of a receiving order as prayed, and I intend to dispute the petitioning creditor's debt, and I dispute that the judgment upon which the said petition purports to be founded is in respect of any legal claim." That was the question that was raised before the registrar. The registrar found that to the extent of 15*l.*, which I need not further mention, there was a debt not in any way tainted with the Gaming Acts, but that as to the rest there was no debt, and therefore he dismissed the petition. The matter is now before us on appeal, and whatever may be the case as to the other parts of the transaction, as to which Mr. Clayton most properly does not waive his right to assert hereafter that he has a good claim, and as to which certainly nothing that I desire to say must be taken to indicate any opinion either for or against it, it is said by Mr. Clayton that the guarantee for 500*l.* is a guarantee to secure an overdraft, and is not in any way invalid. Now under the law prior to 1892 it seems to me quite plain that Mr. Clayton's argument is sound. This Court in the case of *Ex parte Pyke* (1) in the year 1878 drew a distinction to the

(1) 8 Ch. D. 754.

effect that the money was not lent to the bankrupt to enable him to make a bet, but it was lent to him to pay for a bet which he had already made and lost, and as the law then stood the Court held that there was no objection to that, and it took the view that the Act must be construed strictly, and that there was nothing in the earlier Acts to hit the transaction, which was a loan to enable the payment of a bet that had already been made and lost. Now has that law been altered by the Act of 1892? It is said, and the learned registrar seems to have taken that view, that the case was within the language or the spirit of the Queen's Bench decision in *Tatam* v. *Reeve* (1), which was approved by the Court of Appeal in *Saffery* v. *Mayer*. (2) I am unable to accept that view. We have to consider whether it is brought within the language of the Act of 1892, and what that Act says is "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 8 and 9 Victoria, cap. 109 . . . . shall be null and void, and no action shall be brought or maintained to recover any such sum of money." Now was this a promise to pay any sum of money paid by Lancaster under or in respect of any contract rendered null and void? It was not a loan to enable a bet to be made; it was not a loan in respect of a contract to enable something to be done. That seems to me vital. And there is another point that must put an almost insurmountable obstacle in the way of the respondent. What was this 500*l.* transaction? It was a guarantee to secure an overdraft. It was given in September, 1903. What was done under it? The banking account went on for years. The 1633*l.* paid in respect of that guarantee was not paid till September, 1906. Having regard to the rule in *Clayton's Case* (3), I cannot bring myself to doubt—it is so probable as almost to be a certainty—that any vice that there was must have been cured, because having regard to the rule in *Clayton's Case* (3) the presumption is almost irresistible that the original transaction with Turner must have been satisfied and wiped out, so that no question arises with regard to it. In the present case I think that the old

(1) [1893] 1 Q. B. 44. (2) [1901] 1 K. B. 11.
(3) 1 Mer. 585.

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law applicable before the year 1892 prevails, and in that state of things I think there is a good petition on the creditor's part on which the registrar ought to proceed, making such an order as he thinks fit. I do not say a word to prejudice the question as to the amount in respect of which the proof will ultimately be allowed.

FARWELL L.J. I am of the same opinion. On consideration I am convinced that Mr. Hilbery's argument is not sound, and I am glad to be so convinced, because the consequences of adopting it would be far-reaching. His contention was that the money was paid on a promise which comes within the Gaming Act, 1892, and if he is right every loan by a man to a friend to enable him to pay a bet and every cheque by a book-maker on his banking account directing his bankers to pay his losses on bets are also within the Act. Now the words of the Act are "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 8 and 9 Victoria, cap. 109, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." Apart from the question of the rule in *Clayton's Case* (1) I think this was not money so paid. It was simply an overdraft guaranteed by Mr. Lancaster to the extent of 500*l.*, and no money paid in respect of that guarantee was paid in respect of any contract rendered null and void at all. The case has been a little obscured, I think, by the reference to *Saffery* v. *Mayer* (2); but here there was nothing in the nature of partnership or agency authorizing the agent to bind the credit of the so-called partner or principal as the Court of Appeal thought there was in *Saffery* v. *Mayer* (2); the evidence is clear that Mr. Lancaster was not to be liable for losses. The case is simply one where a man is asked as a friend to lend another a sum of money to pay a bet. I am not prepared to hold that that is a transaction which the law forbids. The friend who is so obliging as to lend under such circumstances seeks to recover the sum on the promise so to pay it, not under any contract or agreement rendered void by the Act. I agree with the Master of the Rolls.

(1) 1 Mer. 585. (2) [1901] 1 K. B. 11.

KENNEDY L.J. I am of the same opinion. It is important to get the facts quite clear, I think, having regard to the terms of the statute under which Mr. Hilbery very ably argued that this transaction should not be allowed to stand in support of the claim made by the present petitioning creditor. The parties had an arrangement as to profits, but no partnership was created, and the debtor had no right at all to pledge the credit of the deceased. There were no profits in fact. As to the effect of what that arrangement was as regards proof we say nothing here; but there was in September, 1903, and this is the subject of the present discussion, a debt of 500*l.* which was owing by the debtor to a man named Turner, a bookmaker, in respect of lost bets. In order to pay Turner that racing debt the debtor went to Mr. Lancaster, and according to the debtor's own testimony this is what happened: he says "I told him I owed the money to Turner for bets, and he said he would guarantee a further 500*l.* at the bank to enable me to pay the debt, and I paid Turner." He goes on to say "This was not a loan for future betting purposes." So that the further guarantee was not for the purpose of carrying out the prior arrangement; it was a friendly and a kindly act on the part of the lender, the person advancing the money, in order to enable the debtor to pay a debt, which was no doubt a gambling debt, to Turner. Now is that guarantee of a further sum of 500*l.* to the debtor's bankers a void transaction within 8 & 9 Vict. c. 109? The passage that is material is quoted in the judgment of the Lord Chief Justice, Lord Coleridge, in *Tatam* v. *Reeve* (1), the case mainly relied upon by the respondent, and apparently accepted by the learned registrar, who decided in favour of the debtor. That quotation is "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 8 and 9 Victoria, cap. 109, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." I do not think that the transaction which we are considering fairly falls within those words. In *Tatam* v. *Reeve* (1) an actual payment had been made by the plaintiff to

(1) [1893] 1 Q. B. 44.

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certain gambling creditors of the defendant at the defendant's request. The Court held that it fairly came within the section. I cannot apply that section to this case. What was done here was that the debtor went to Lancaster and said "I have incurred a debt, will you increase the guarantee to the bank in order to enable me to pay it?" I cannot without forcing the words treat that as a transaction in which there was a payment by Lancaster to the creditor. There has been no payment by him "in respect of any contract or agreement," and unless there has been such a payment the statute does not apply. I do not think it right to construe this section so as to bring within it a transaction like the present. I think the appeal must be allowed.

*Appeal allowed.*

Solicitors: *S. F. Miller, Vardon & Miller; Henry Hilbery & Son.*

G. A. S.

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1911

*July 27.*

## *In re* BOND.

## *Ex parte* CAPITAL AND COUNTIES BANK, LIMITED.

*Bankruptcy—Judgment Debt—Stay of Execution—Bankruptcy Notice—Appointment of Receiver by Way of Equitable Execution—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

A judgment creditor obtained, by way of equitable execution, the appointment of a receiver of certain property of the judgment debtor. There was no evidence that there was any money of the judgment debtor in the hands of the receiver, nor was he in possession of any interest of the judgment debtor which could be sold:—

*Held*, that as the appointment of the receiver did not prevent the debtor from paying the judgment debt it did not operate as a stay of execution within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, and that the judgment creditor was therefore entitled to serve a bankruptcy notice on the judgment debtor in respect of the judgment.

APPEAL by the debtor Bond from a receiving order made by the registrar of the Nottingham County Court.

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BOND, *In re.* CAPITAL AND COUNTIES BANK, LIMITED. *Ex parte.*

On February 11, 1908, the respondents, the Capital and Counties Bank, Limited, obtained final judgment against the debtor in an action in the King's Bench Division for 18,509*l.* 13*s.* 10*d.*

On July 9, 1908, the respondents obtained by way of equitable execution in the action the appointment of a receiver of all the share and interest of the debtor in certain partnership assets. It was uncertain whether the debtor had any property or assets beyond those taken in equitable execution by the respondents.

There was no money of the debtor in the hands of the receiver, nor was he in possession of any interest of the judgment debtor which could be sold.

On April 26, 1911, the respondents served upon the debtor a bankruptcy notice in respect of the judgment. The debtor failed to comply with the bankruptcy notice, and on May 19, 1911, the respondents filed a petition in the Nottingham County Court for a receiving order in respect of the estate of the debtor, the act of bankruptcy alleged in the petition being that the debtor had failed to comply with the bankruptcy notice.

The registrar made the order.

The debtor appealed.

*E. W. Hansell,* for the appellant. The appointment of the receiver operated as a stay of execution upon the judgment within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883 (1),

(1) Bankruptcy Act, 1883, s. 4, sub-s. 1: "A debtor commits an act of bankruptcy in each of the following cases:— . . . .

"(*g*) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the

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and the respondents were therefore not entitled to serve the bankruptcy notice. In order that a bankruptcy notice may be good the creditor must be, at the date of the service of the notice, in a position to issue execution. The respondents were not in that position, as the appointment of the receiver by way of equitable execution prevented any further execution being issued: *In re Follows* (1); *In re Phillips* (2); *In re a Debtor.* (3)

*Clayton, K.C.*, and *Frank Mellor*, for the respondents. It is quite true that where something is done by a judgment creditor which operates as a stay of execution upon the judgment he is not entitled to serve a bankruptcy notice under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883. But the appointment of a receiver by way of equitable execution does not operate as a stay of execution. If the respondents found goods belonging to the appellant they could seize the goods under a writ of fi. fa. even though they have issued equitable execution. The grounds upon which a second writ of fi. fa. cannot issue upon a judgment whilst the first writ is still effective are not applicable where a receiver has been appointed by way of equitable execution. The rule with regard to a writ of fi. fa. was a purely technical common law rule: *In re Follows.* (1) The appointment of a receiver is not really equitable execution. The term "equitable execution" is not accurate. The decision in *In re Sedgwick* (4) shews that a charging order on shares does not operate as a stay of execution so as to prevent a bankruptcy notice being issued. If the respondents discovered further assets belonging to the debtor of such a nature that further equitable execution would be appropriate there would be nothing to prevent them from issuing it. [*Ex parte Ford* (5) was also referred to.]

*E. W. Hansell* in reply. The judgment of Cave J. in *In re*

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notice, or satisfy the Court that he has a counter-claim set off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

(1) [1895] 2 Q. B. 521.
(2) (1888) 5 Morrell, 40.
(3) [1902] 2 K. B. 260.
(4) (1888) 5 Morrell, 262.
(5) (1886) 18 Q. B. D. 369.

*Phillips* (1) covers the present case and is decisive in the appellant's favour.

PHILLIMORE J. The question whether the respondents having issued what is termed equitable execution by means of the appointment of a receiver are entitled to serve a bankruptcy notice has given me some little trouble. Under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, the right of obtaining a receiving order against a debtor by reason of non-compliance with a bankruptcy notice is subject to the condition that execution upon the final judgment obtained by the creditor should not have been stayed. On behalf of the appellant it is said that the pendency of a writ of fi. fa. where execution has been issued in the ordinary way amounts to a stay of execution because while the writ is pending a second writ of fi. fa. cannot be issued, and that therefore a creditor who has issued execution by means of a writ of fi. fa. cannot serve a bankruptcy notice, because he is in the position of a creditor with a judgment upon which execution has been stayed. That is a purely technical rule which only applies where the same conditions exist or where there is a writ of fi. fa. which is still effective. In the present case no writ of fi. fa. has been issued. There has merely been equitable execution by means of a receivership. There is nothing to prevent the respondents obtaining the appointment of other receivers, nor is there anything to prevent the issue of a writ of fi. fa. I think that the technical rule with regard to the writ of fi. fa. is based upon the principle that a creditor must not seize a debtor's goods in execution, and thereby prevent him paying the debt, and at the same time serve him with a bankruptcy notice for the purpose of making him a bankrupt. That is the reason why when execution is still running by means of a fi. fa. a creditor cannot serve a bankruptcy notice. But the principle does not apply to cases where there has only been equitable execution. The Court may inquire whether the equitable execution has in any way prevented the debtor from paying his debt. But in this case there is no money in the hands of the receiver. If there were money in the hands of the receiver it would be applied in payment of this debt.

(1) 5 Morrell, 40.

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There is no suggestion that the receiver is in possession of any interest which could be sold, and I therefore think that neither in substance nor technically is there any ground for the appellant's contention.

AVORY J. I am of the same opinion.

*Appeal dismissed.*

Solicitors for appellant: *Clinton & Co., for J. Pierce, Nottingham.*

Solicitors for respondents: *Cameron, Kemm & Co.*

J. E. A.

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C. A.

1911

*July* 14, 28.

[IN THE COURT OF APPEAL.]

## *In re* CAMPBELL.

## *Ex parte* SEAL.

*Bankruptcy—Proof—Unregistered Money-lender—Money-lending Transaction—Illegal Contract—Judgment in Default of Defence—Subsequent Arrangement not to enforce Judgment—Payment by Instalments—Agreement "with respect to the advance and repayment of money"—Money-lenders Act,* 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*c*).

The appellant, an unregistered money-lender, became the holder of certain promissory notes made by the debtor in respect of a money-lending transaction and obtained judgment in default of defence against the debtor in an action upon the notes. An arrangement was subsequently made whereby the debtor agreed to pay the debt with certain interest by instalments, and all further proceedings upon the judgment were to be stayed. The debtor having been adjudicated a bankrupt, the appellant claimed to prove in the bankruptcy for the amount due under the arrangement:—

*Held*, (1.) that the arrangement was an agreement entered into by the money-lender in the course of his business as a money-lender "with respect to the advance and repayment of money" within s. 2, sub-s. 1 (*c*), of the Money-lenders Act, 1900; and (2.) that, the original transaction being unlawful, the judgment would not have been conclusive against the trustee for the purposes of proof, and the subsequent arrangement did not prevent the Court from going behind the transaction and rejecting the proof.

APPEAL from a decision of Phillimore J. rejecting a proof by the appellant Seal in the bankruptcy of Campbell, the debtor, on

the ground that at the date of the transaction in respect of which the appellant claimed to be a creditor he was an unregistered money-lender and the transaction was a money-lending transaction.

The appellant in respect of the transaction in question became the holder of certain promissory notes made by the debtor for 4000*l.* In an action on these notes the appellant on June 19, 1906, signed final judgment against the debtor in default of defence under Order XIV. On July 30, 1906, an arrangement was entered into whereby the debtor was to pay the debt with certain interest by instalments, and all further proceedings upon the judgment were to be stayed. The debtor was subsequently adjudicated a bankrupt, and the appellant sought to prove in the bankruptcy for the amount due under the arrangement of July, 1906. The trustee in bankruptcy rejected the proof, and Phillimore J. dismissed an appeal from that decision on the ground that the appellant was an unregistered money-lender and the transaction under which he became the holder of the promissory notes was a money-lending transaction. The learned judge held that the original contract was illegal and that neither the judgment nor the subsequent arrangement prevented the Court of Bankruptcy from going behind the transaction.

From this decision the present appeal was brought.

The findings of Phillimore J. that the appellant was an unregistered money-lender and the transaction in question a money-lending transaction were not seriously contested on the hearing of the appeal, but it was contended that the Court could not go behind the judgment, or at any rate that the arrangement subsequent to the judgment constituted a new contract for good consideration which was sufficient to support the proof.

*Clayton, K.C.*, and *E. W. Hansell*, for the appellant. Assuming that Seal was a money-lender within the Act and that the original transaction was a money-lending transaction, the Court will not go behind the judgment. Moreover the appellant submits that the agreement of July 30, 1906, was for an entirely new and

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separate consideration, namely, the forbearing to exercise the right of execution: *Hyams* v. *Stuart King*. (1)

[COZENS-HARDY M.R. Is not that an agreement with respect to the advance and repayment of money within the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2, sub-s. 1 (*c*)?]

*Dobb* (*Rawlinson*, *K.C.*, with him), for the trustee in bankruptcy. This case comes within s. 2, sub-s. 1 (*c*), of the Act: *Bonnard* v. *Dott* (2); *Victorian Daylesford Syndicate, Ld.* v. *Dott*. (3) The original transaction was illegal, and the agreement to give time forms no good consideration for a new contract. The trustee is entitled to treat the judgment as a nullity, and the agreement being founded on a nullity must go with it. It is impossible to remove the taint of illegality.

*Clayton*, *K.C.*, in reply. The compromise of a disputed claim made bona fide is a good consideration for a promise, even although it ultimately appears that the claim was wholly unfounded: *Callisher* v. *Bischoffsheim*. (4) The transaction is not for all purposes nugatory: *Lodge* v. *National Union Investment Co.* (5) The judgment gives a legal right to execution so long as it is not set aside. The Court cannot go behind the new contract even if it can disregard the judgment.

*Cur. adv. vult.*

COZENS-HARDY M.R. This is an appeal from the judgment of Phillimore J. rejecting a proof in bankruptcy by the appellant. The learned judge held that the appellant was a money-lender and that the transaction in respect of which the debtor gave the appellant thirteen promissory notes, dated November 10, 1905, for the total sum of 4000*l*. was a money-lending transaction. The appellant, who is a solicitor, was not at the material dates registered as a money-lender. The findings of the learned judge on these matters were clearly justified by the evidence, and indeed the appellant did not seriously contest either of those findings. The promissory notes fell due on May 12, 1906, and on May 17, 1906, a writ was issued by Seal

(1) [1908] 2 K. B. 696.
(2) [1906] 1 Ch. 740.
(3) [1905] 2 Ch. 624.
(4) (1870) L. R. 5 Q. B. 449.
(5) [1907] 1 Ch. 300.

against Campbell and three other gentlemen liable on the notes. On June 1 Seal obtained liberty to sign final judgment against Campbell for the amount indorsed on the writ, with interest, and judgment was signed on June 19 for 4022*l.* 8*s.* 11*d.* and 8*l.* costs. On July 30, 1906, an arrangement was come to between Campbell and Seal in the terms of a memorandum signed by both parties, the effect of which was that the 4000*l.* debt, which matured on May 12, 1906, was to carry interest from that date at 9 per cent. reducible to 7½ per cent., and the debtor was to pay the debt by quarterly instalments, the appellant retaining certain securities which he held for the debt. On November 6, 1906, an order was made staying all further proceedings against the debtor upon the terms set out in the arrangement. The appellant's proof is based upon the memorandum of the arrangement. The learned judge has rejected the proof on the ground that the original contract was illegal and that neither the judgment nor the subsequent arrangement prevented the Court of Bankruptcy from going behind the transaction. In my opinion this decision was perfectly right. I think the case falls within s. 2, sub-s. 1 (*c*), of the Money-lenders Act, 1900, which provides that "a money-lender shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money otherwise than in his registered name." It is true that the arrangement was not executed before the advance, but I think it was an agreement with respect to the advance and repayment of money, although not an agreement for the advance. On this short ground I think the appeal fails. But I also think that the ground upon which the learned judge rejected the claim was correct. It has been decided by this Court in *Bonnard* v. *Dott* (1) that an agreement of this nature with an unregistered money-lender is not merely void but unlawful. I think it is plain that so long as the matter rested upon the judgment it was competent to the trustee to go behind the judgment and to say as there was no legal debt the proof founded on that judgment could not stand. I do not think the arrangement for repayment of the debt, which in truth was not a debt, by

(1) [1906] 1 Ch. 740.

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instalments in any way prevented the trustee from asserting that an agreement to get time for payment by instalments of an unlawful debt cannot prevent the Court from going behind the transaction. It is not necessary to consider whether the debtor could himself have raised this objection. The trustee is plainly in a different and better position. On both grounds I think the decision of the learned judge was correct, and this appeal must be dismissed.

FARWELL L.J. Phillimore J. has found as a fact that the transaction in question was a money-lending transaction and that at the date thereof the appellant was a money-lender within the meaning of the Act and was unregistered, and it cannot be seriously contended that he was wrong in so finding. It follows from this that as a matter of law the transaction was illegal and void and constituted a criminal offence, and can therefore form no ground for civil proceedings: *Whiteman* v. *Sadler*. (1) [The Lord Justice read from the judgments of Lord Macnaghten, Lord Dunedin, and Lord Mersey in that case at pp. 521, 525, and 534, and continued.] It follows also that no judgment could have been obtained for the alleged debt if the Court had been informed of the true facts, and that judgment having been obtained in default of appearance, such judgment would be set aside as a matter of course under ordinary circumstances. Whether the conduct and delay of the debtor in the present case if he were not a bankrupt would have proved an insuperable obstacle in his way it is unnecessary to consider: the application is by his trustee in bankruptcy, and it is clear that he is entitled to go behind the judgment. But then it is argued that the irrecoverable advance was merged in the judgment, and that the judgment was satisfied by the subsequent agreement by the debtor to pay by instalments, in consideration of which the creditor did not levy execution, and that this is a new and good contract. Phillimore J. overruled this contention, but with some doubt: I think that he was right without any doubt. The taint of criminal illegality runs through the whole transaction: there is no actual consideration

(1) [1910] 1 K. B. 868; [1910] A. C. 514.

from beginning to end, except the original loan: the judgment and the subsequent agreement emanate from and rest upon this, and are destroyed by it, just as in *Fisher* v. *Bridges* (1) the document under seal, although sufficient consideration at law, was tainted with and avoided by the illegality of the transaction on which it was founded. The case of *Hyams* v. *Stuart King* (2), relied on by the appellant, is an authority against him: the majority of the Court held that there is no illegality in making or paying a bet, and that a new contract to pay the lost bet for a new and good consideration was not tainted by illegality so as to be avoided. Fletcher Moulton L.J. held that betting was illegal so as to render the second transaction void: it is clear that the whole Court were of opinion that an illegal and criminal transaction would have invalidated the entire transaction. It may seem strange that a bookmaker should be in a better position than an unregistered money-lender, but this results from legislation that makes a loan by the latter illegal and criminal, and leaves bets irrecoverable only but not illegal.

Further I am not prepared to hold that a money-lender can avoid the Act by obtaining judgment and then making terms for repayment of the judgment debt: as at present advised I think that such a transaction would fall within s. 2, sub-s. 1 (*c*), but I prefer to rest my judgment on the first ground.

KENNEDY L.J. The Master of the Rolls has stated all the material facts of this case, and I concur in the result at which both he and Farwell L.J. have arrived in dismissing this appeal. I desire only to refer to that portion of the case which has created sufficient doubt in my mind to make me feel that it was my duty to take time for consideration before giving judgment on the appeal. I see no reason for dissenting from the conclusions of Phillimore J. that the appellant was a money-lender within the meaning of the Money-lenders Act, 1900, s. 6, and that the transaction in question was a money-lending transaction. Nor do I doubt the soundness of the general proposition that in the Bankruptcy Court the trustee, in dealing with a proof, may, as the phrase is, go behind a judgment obtained against the

(1) (1854) 3 E. & B. 642. (2) [1908] 2 K. B. 696.

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bankrupt, and reject a proof founded upon the judgment, where the judgment has been obtained with the consent or by the default of the bankrupt, and where it can be shewn, clearly and undoubtedly, that the judgment creditor's action was without any legal foundation. In the present case, the trustee has shewn that the transaction was a money-lending transaction entered into by a person who was a money-lender within the Money-lenders Act, 1900, s. 6, and that, as he was not registered under the Act, the contract was a contract made illegal by s. 2, sub-s. 1 (*c*), of the Act. So far, therefore, as regards the judgment obtained by the appellant against the bankrupt, it is, I think, clear that the trustee in bankruptcy is not bound to admit the proof founded upon that judgment. But, in view of some portion of the argument addressed to us, I ought, speaking only for myself, to add that I think that Campbell, the judgment debtor, could have himself procured the judgment to be set aside on that ground. There was no fraud or collusion: he chose not to raise the defence of illegality under s. 2, sub-s. 1 (*c*); and while I do not differ from Phillimore J. in his conclusion as to the lender being a money-lender within the Act, or as to the transaction being a money-lending transaction, I think also that no one can read his judgment on those points without seeing that the questions involved are arguable questions depending upon the result of extrinsic evidence. Under Order XIX., r. 15, all "facts shewing illegality either by statute or common law" must be raised by the defendant's pleading. It is quite true that when the facts or the documents which appear upon the face of a plaintiff's case (as e.g. in the instrument upon which he sues) demonstrate the illegality of the transaction which forms the subject of the action, it is, in my view at least, the duty of the adjudicating tribunal to refuse to give effect to it, whether pleaded by the defendant or not. But in the present case the mere fact of a loan by the solicitor certainly does not shew that the transaction is within the Act of 1900. The defendant, in order to make good a plea of illegality, would have to shew by evidence that the lender was a "money-lender" within the Act. This was done in a case referred to—*Fisher* v. *Bridges*. (1) The defendant, to an action

(1) 3 E. & B. 642.

on a covenant in a deed, pleaded the illegality of the transaction that the deed was given to secure. He gave evidence of the extrinsic facts which satisfied the jury of the truth of his allegation, and the Court held that it was a good plea. If the borrower in such an action as the present does not choose to fight the disputable point, he cannot be entitled afterwards to reopen the judgment against him by alleging that he might successfully have relied upon a defence of illegality if he had adduced certain evidence to prove that the case came within s. 2, sub-s. 1 (*c*).

One more thing I desire to say. I base my opinion of the trustee's right to go behind this judgment on the ground of the illegality of the contract only as in contravention of s. 2, sub-s. 1 (*c*). The recent judgments of Lord Dunedin and Lord Mersey in the House of Lords in *Whiteman* v. *Sadler* (1) appear to me, if I understand the judgments, to correct or modify a view to which some colour may be thought to be given by dicta which appear in some of the judgments in *Bonnard* v. *Dott* (2) and *Whiteman* v. *Sadler* in the Court of Appeal (3), that a contravention by a money-lender of either s. 2, sub-s. 1 (*a*), (*b*), or (*d*), which might—I say might, because as at present advised I think that the mens rea would have to be proved—no doubt render the money-lender liable to penalties under s. 2, sub-s. 2, would therefore necessarily make, as a contravention of s. 2, sub-s. 1 (*c*), clearly does make, his money-lending contracts themselves illegal.

If the trustee in the present case can, as I hold that he can, go behind the judgment against the bankrupt, the question still remains which caused Phillimore J., as he said, more hesitation than any of the other points in the case. The trustee in bankruptcy can go behind the judgment: can he also go behind the contract, already partly executed, of July 30, whereby the judgment creditor agreed, for a certain consideration in the shape of interest, not to enforce the judgment, and to take instead payment by instalments at deferred dates?

Apart from a special provision in the Act which, I think, affects this agreement and to which I shall refer presently, I should have felt a difficulty in holding that he could do so.

(1) [1910] A. C. 514. (2) [1906] 1 Ch. 740.
(3) [1910] 1 K. B. 868.

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The judgment obtained by the judgment creditor, without fraud or collusion, was, as between him and the bankrupt, valid and conclusive. The bankrupt had been advised, or, at any rate, had chosen, not to raise and endeavour to prove a case of some doubt upon the facts under s. 2, sub-s. 1 (*c*). To speak of the agreement forbidden by that section as "criminal" is, I think, not quite accurate. One of the parties is forbidden to make the agreement except in a registered name, and under sub-s. 2 that same party becomes liable to a penalty of fine, and, in case of repetition, of imprisonment, if he contravenes the prohibition. The money-lender has thereby committed an offence; but participation in the agreement on the part of the borrower does not constitute either a crime or an offence on his part. I doubt whether a contractual bargain itself can be correctly and accurately described as "criminal," when it is not such that each of the parties to it thereby renders himself liable to punishment, as in the case of the bargain for a vote in a parliamentary election, where both briber and bribed become, by reason of the bargain, liable to penal consequences. If this be so, I do not myself see by what reasoning it follows that because the judgment debtor's trustee in bankruptcy may "go behind" the judgment, he can go on to upset a subsequent agreement which was honestly made, for sufficient consideration, between creditor and debtor, at a time when the judgment was binding upon the judgment debtor, and which has been in fact partly executed in favour of the judgment debtor, before the trustee in bankruptcy puts forward any claim to set it aside.

Apart, therefore, from the applicability, pointed out by the Master of the Rolls in the course of the argument, of s. 2, sub-s. 1 (*c*), to this agreement of July 30, I should have felt, upon the ground which caused doubt to Phillimore J., and which was the principal ground relied on by the appellant in this Court, a difficulty in dismissing this appeal. But s. 2, sub-s. 1 (*c*), makes illegal not only an agreement such as the original agreement in this case for the advance and repayment of money, but any agreement "in respect of" the advance and repayment of money. It seems to me that this agreement of July 30 falls within this description, and none the less because of the

judgment in the action. I agree, on this ground, that the appeal should be dismissed.

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*Appeal dismissed.*

Solicitors : *Seal; Arnold & Cubison.*

G. A. S.

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## DEDDINGTON STEAMSHIP COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

*Revenue—Stamp—Marketable Security—Instrument for Disposition of Interest or Property in Ship—Debenture purporting to create Charge on Ships—Previous Legal Mortgage of same Ships to Trustees—Trust Deed declaring that Legal Mortgage was held in trust for the Debenture-holders—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *First Schedule, General Exemptions from all Stamp Duties, clause* 2.

A company issued a debenture bond for 1000*l.* and interest which was a marketable security within the meaning of the First Schedule to the Stamp Act, 1891. The debenture was one of a series protected by a trust deed. It purported to create a charge upon three ships belonging to the company. These ships had previously been mortgaged by legal mortgages registered under the Merchant Shipping Acts to trustees for the debenture-holders. The trust deed contained covenants for payment of principal and interest and provisions for the maintenance and realization of the security usual in trust deeds. The debenture provided that the holder should have the benefit pari passu with other debenture-holders of the mortgages :—

*Held*, that the debenture bond did not create any charge on the ships beyond that already in existence, and that if it did create any charge its substantial object was to create not a charge but a marketable security, and it was therefore not an instrument for the disposition of a ship within clause 2 of the General Exemptions from all Stamp Duties contained in the First Schedule to the Stamp Act, 1891, but was liable to stamp duty as a marketable security under the same schedule.

THIS was an appeal from the decision of Hamilton J. (1) upon a special case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891, that a debenture bond issued by the Deddington Steamship Company was not within

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the second general exemption from stamp duties contained in the First Schedule to the Stamp Act, 1891 (1), and was liable to duty under the head of "Marketable Security" in the same schedule. The instrument is fully set out in the report of the case below (2), but it is thought the following summary will be sufficient for this report.

The instrument was a marketable security. It was headed—

"No. of Bond 1. £1000 0*s.* 0*d.*

"The Deddington Steamship Company, Limited.

(Incorporated under the Companies Acts, 1862 to 1888.)

"Issue of debentures not exceeding in amount 20,000*l.* pari passu as a charge on the steamships *Arlington*, *Clinton*, and *Buxton*."

Then followed a covenant by the company to pay to Mrs. Bailey or other the registered holder for the time being of the debenture the sum of 1000*l.* on January 1, 1915, or such earlier day as the principal moneys should become due, and to pay interest at 5 per cent. by equal half-yearly payments in the meantime, and continued:

"And the company do hereby charge with the payment of the said sum of 1000*l.* and interest the steamships *Arlington*, *Clinton*, and *Buxton* respectively, of the port of Hull, and to the benefit of the charge hereby made and the mortgages on such vessels given to the trustees for debenture-holders this and other debentures of this series are entitled pari passu."

The debenture bond also contained provisions enabling the company to use and employ the steamships in the usual manner until default should be made in payment of principal or interest for one month, or there should be an order made or a resolution passed for winding up the company, or a distress or execution levied, or a breach committed by the company of any of the covenants contained in a deed of covenants dated December 22, 1909, and made between the company and trustees for the

(1) Stamp Act, 1891, First Schedule, "General Exemptions from all Stamp Duties":

"(2.) Instruments for the sale, transfer, or other disposition either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel."

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ture-holders. And it was declared that from and after such it, order or resolution the liberty of the company to use the s should be determined, and that the debenture was issued t to and with the benefit of the conditions indorsed thereon. indorsed conditions contained the usual provisions for ng the debenture one of a series to be issued not exceeding 0*l.*, and keeping a register and entering transfers, paying st, and giving the registered holder an absolute title to cipal and interest, and the following provisions :—

"The holders for the time being of this debenture and the debentures of this issue (in addition to the charge hereby tively created) shall be entitled pari passu to the benefit of l of covenants dated December 22, 1909, and made between mpany of the one part and George Jones and Thomas Bailey ees for debenture-holders) of the other part, and referred to foregoing debenture and three several mortgages of even therewith given by the company to the said trustees, by the steamships *Arlington*, *Clinton*, and *Buxton*, of the f Hull, have been vested in the said trustees for securing ayment of the principal moneys and interest payable by of such debentures and the performance of the stipulations ein contained."

"The principal moneys hereby secured shall immediately e payable if there be a breach by the company of the deed venants mentioned in the last preceding clause."

conditions also contained power for the company to pay y debenture at any time after January 1, 1913, and for ining by drawings the particular debentures to be paid off. deed of covenants referred to, after reciting that the three ages of the ships had been granted to the trustees, con- covenants with the trustees for the payment of principal y and interest secured by the debentures and the trust that the same principal moneys and interest should be a on the steamships ; that the company would keep the ships in good repair and insured, and that in default the es might repair and insure the same at the expense of the any ; and a power for the trustees under certain circum- ces to take possession of the ships and sell them.

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The three mortgages referred to in the debenture and deed of covenants were mortgages of each ship singly in the statutory form prescribed by the Merchant Shipping Act. 1894. and registered.

The appellants contended that the debenture bond was exempt from duty under the second general exemption in Sched. I. to the Stamp Act. 1891. The Commissioners. being of opinion that it was not so exempt, held that it was liable to duty under the head "Marketable Security" in the said schedule and assessed the duty at 2*s*. 6*d*. per cent. on the amount secured.

Hamilton J. decided in favour of the Commissioners. and the company appealed.

*Clauson*, K.C., *A. Adair Roche*, and *T. Cochburn*, for the appellants. The learned judge below held that the debenture had no effect except to create a marketable security. That is a fallacy. The debenture was necessary to complete the charge. Until it was executed there was no mortgage. The debenture first gave the holder an equitable interest in the ship. The object of the debenture was to make the holder a secured creditor.

[KENNEDY L.J. One object was to create a marketable security. Can you escape stamp duty because the document had two objects?

*Sir Rufus Isaacs*, *A.-G.* *Speyer Brothers* v. *Inland Revenue Commissioners* (1) is a direct authority that you cannot.]

That case has nothing to with the general exemptions. The debenture is not a separate charge. but it is the last step in a charge. It is only by virtue of that step that the creditor gets any interest in the ships. Hamilton J. said that the instrument "does not really dispose of any interest." That is where the appellants ask the Court to differ from him, because until the debenture is issued no one has a charge.

The judgment of Lindley L.J. in *In re Birchum* (2) shews clearly that it is the execution of the debenture. not the trust deed. which creates a charge and gives an interest. *Ivimey* v. *Brook* (3) shews that where the company owns land a debenture creates an

(1) [1908] A. C. 92. (2) [1895] 2 Ch. 786.
(3) [1893] 1 Q. B. 744.

interest in land. Even if it is only an equitable interest the words of the exemption "any disposition" are sufficient to include equitable interests. In *Duke of Northumberland* v. *Attorney-General* (1) Lord Macnaghten, speaking of the Succession Duty Act, says "The terms 'disposition' and 'devolution' must have been intended to comprehend and exhaust every conceivable mode by which property can pass." And s. 57 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), shews that though only legal interests can be entered on the register, the Act deals with equitable interests. The practice of the Inland Revenue Office is to hold that the exemption includes equitable interests.

*Sir Rufus Isaacs, A.-G.*, and *W. Finlay*, for the respondents. Instrument "for sale, transfer, or other disposition" in the exemption means instrument which has for its principal object such disposition. If it includes other objects it is conceded that it is not exempt, and that must depend on the fact that the word "for" means "having for its primary object." The primary object of the debenture is the covenant with the particular individual and the giving him a share in the charge already given to the trustees. No charge is given apart from the trust deed. The most probable construction is that the second general exemption refers only to legal interests, as the first and third exemptions, "transfers of shares" and "instruments of apprenticeship," clearly do. A charterparty creates some interest in a ship, but it is certainly not included in the exemption, for it is specially charged by the First Schedule and s. 49. A marketable security is also specially charged, and the exemption must therefore be construed so as to exclude both a charterparty and a marketable security. The case is really covered by *Speyer Brothers* v. *Inland Revenue Commissioners*. (2) The judgment of Hamilton J. is correct.

*Clauson, K.C.*, in reply, referred to *Attorney-General* v. *Montefiore*. (3)

COZENS-HARDY M.R. This is an appeal from a decision of Hamilton J., who has held that the debentures issued by the

(1) [1905] A. C. 406. (2) [1908] A. C. 92.
(3) (1888) 21 Q. B. D. 461.

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appellant company, the Deddington Steamship Company, are chargeable with duty.

It is conceded that the debentures are marketable securities. That has not been argued here; it was conceded in the Court below, and it is stated in the case and may be taken to be admitted. But it is said that although they are marketable securities the appellants ought not to pay the duty attributable under the Stamp Act to marketable securities because the case falls within the general exemptions from all stamp duties to be found in the Act. The exemption relied upon is in s. 2 of the General Exemptions: "Instruments for the sale, transfer, or other disposition either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel."

Now the facts here may be stated very shortly. The company own three vessels. They were minded to borrow money, and they were minded to borrow money on marketable securities. They executed legal mortgages, which were duly registered, of the three ships in favour of two trustees. That undoubtedly gave a good charge at law upon the ships in favour of those two trustees. That having been done, these two trustees, who had the legal charge, which would take priority over every subsequent disposition, executed a declaration of trust to this short effect—that they held their securities upon trust for the debentures to be issued to the holders of debentures from time to time upon the terms stated in the schedule to the deed under which there was to be a register of debentures, the debentures were to be transferable without regard to equities, and, in fact, the deed contained all the usual provisions (including a covenant to pay) which are found in debenture trust deeds with which we are all in this Court very familiar. That having been done, a few days afterwards the debentures were issued. They are headed "Issue of debentures not exceeding in amount 20,000*l.* pari passu as a charge on the three steamships." Then there was a covenant to pay the registered holder of a debenture, and then it says, "The company do hereby charge with the payment of the 1000*l.* and interest" the three steamships. The next words are not very grammatical, but I assume that they are intended to give

the debenture-holder the benefit of the three mortgages and the trust deed. In that form it purports to charge with the 1000*l.* that which had already been charged in favour of the trustees by a charge which the company could not derogate, and it purported to give in this form the benefit of the charge which had already been granted by the deed.

It was contended by Mr. Clauson and by Mr. Roche, in their very able argument, that although it is not true to say that a fresh and additional charge, beyond that which was given to the trustees by the registered charge, is to be found in the debenture, yet as the transaction entered into by the deed of charge and the deed of trust was a bare legal charge, the sole beneficiary being the company until the debenture was issued, in the true sense of the word this debenture did for the first time create out of the resulting trust or equitable interest, or whatever you like to call it, of the company, a charge on the ships in favour of the holder of this debenture. That is, I think, the way in which Mr. Clauson put it. Then he says that is a disposition of a ship, and it is therefore entirely exempt from stamp duty. I have great difficulty in following that argument. I think we must look at the substance of the transaction. The substance of the transaction here was, as it seems to me, the issue of negotiable securities by the company by the creation by the company of a registered mortgage which has had the benefit of the exemption, the execution of the trust deed, and the issue of this third document, the debenture, which was a negotiable instrument, and although it did incidentally give to the debenture-holder the benefit of the registered charge under the trust deed, it cannot, I think, be regarded in any fair sense of the term as an instrument for the disposition of a ship by way of mortgage. That is not what it was. Its object was to give a negotiable security, although incidentally it also did give in that curious roundabout way which I have pointed out the benefit of a charge, and therefore, in a certain sense, a charge upon the ship. The debenture was not a charge which the holder of the debenture could have enforced against the company alone. It was not an independent charge given to him. He could not have taken any proceedings against the company in respect of the ships except in the name or in the presence of the

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trustees, who were trustees for all the debentures which might be issued.

On this short ground, without considering the point, which may at some time deserve serious consideration, whether or not the exemption has any application to what I may call merely derivative equitable interests, and upon which I express no opinion, I think the substance of this transaction here is that we are dealing with marketable securities. Marketable securities were intended to be created, and the instrument creating marketable securities is not one which is, within the fair meaning of the language, an instrument for the disposition of a ship.

On this ground I think the judgment of Hamilton J. is right, and the appeal must be dismissed.

FARWELL L.J. I am of the same opinion and for the same reasons. The question is really whether this is in substance a marketable security subject to tax, or an "instrument for the sale, transfer, or other disposition either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel." In my opinion the real substance of the matter is the creation of a marketable security. If the company, having got the ship and other assets, charges them both, the exemption certainly does not apply, because although it is a charge on a ship it is also a charge on other property, and in that respect it becomes liable to duty. So again, if the debenture contains no words of charge at all, but simply contains words giving the benefit of an equitable interest in the legal transfer created by the deed of transfer to the trustees, there would, in my opinion, be no ground for saying that those debentures were in any way exempt as charges on property. Here words of express charge are added, but they add nothing whatever to the debenture-holder's security. It is suggested that if the trust deed had failed, for some reason or other, to have effectual operation, these debentures could supplement it. But the trust deed has not so failed and there is nothing to supplement. It is plain that the debenture-holder cannot enforce his charge alone; he must make the trustees for the debenture-holders parties to any action he may take against the company,

and the charge to these trustees is for the benefit not only of the debenture-holder who sues, but of all the other debenture-holders, and has priority over any individual rights that the debenture-holder plaintiff may seek to enforce in his own right. The trust deed and the legal charge to the trustees in substance create the only charge which is created, and the debenture merely gives the debenture-holder an equitable interest in the charge so created for the purpose of enabling him to deal with it as a marketable security. The object is not to give him a charge, for that has already been created for his benefit by an overriding deed, but to give him a marketable security. That being so, it appears to me to be unnecessary to consider, or at any rate to express any final opinion upon, the question whether sub-s. 2 refers to "equitable interest" at all. It is quite plain that one must have regard to the earlier parts of the Act to see whether the generality of sub-s. 2 is in any way restricted.

The Master of the Rolls in the course of the argument referred to charterparties, which are certainly in a sense a disposition of a ship other than by way of sale, or transfer, or mortgage, but they are expressly made subject to a tax which has to be dealt with by an adhesive stamp affixed, and it certainly could not be contended that they come within the exemption. In the same way, if the marketable security is plainly the primary object of the document with which we are dealing, it cannot claim the exemption because the company has thought fit to put in an inoperative and useless phrase, charging the ships for the benefit of that debenture-holder who has already got, by virtue of the same document, the benefit of the paramount overriding charge in the trustees on the same property.

I agree that this appeal should be dismissed.

KENNEDY L.J. The whole question in this case turns upon the instrument itself. Is this an instrument within sub-s. 2 of the General Exemptions from all Stamp Duties "for the sale, transfer, or other disposition either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel"?

I think it is conceded—if it is not conceded I think it ought

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to be conceded—that you cannot take the meaning of the words "instrument for" the various purposes there mentioned as equivalent to "instrument having the effect of." It is not disputed, for example, that an instrument which had the effect of transferring a part interest in a vessel would not come within the section if it also transferred other interests at the same time. What I understand the exemption to mean is this: it means that the object and purpose of the instrument must be looked at. What is its purpose? In this case, upon the facts before us, I agree, as it has been already put, that this instrument, although it may on its face affect the interest in these three ships, is an instrument not for that purpose, but an instrument for the creation of a marketable security. I wish to be understood, as the learned judge in the Court below wished to be understood, very clearly, to be deciding on the fact of this particular case that there had been already the other instruments created, and therefore I wish to guard my decision in the same terms as Hamilton J. guarded his, by adding that my judgment will not necessarily apply except where instruments of substantially the same form are employed and are preceded by deeds of trust and mortgages also in substantially the same form as in the present case. If the facts had been different, if there had not been the other instruments, I am not deciding that my judgment would be the same. But as the facts stand the object was to create an instrument for bringing into play a mercantile marketable security and not for the purpose which alone justifies a claim for exemption under this section of the Stamp Act.

*Appeal dismissed.*

Solicitors for appellants: *Botterell & Roche.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

J. R. B.

[IN THE COURT OF APPEAL.]

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## DUKE OF NORTHUMBERLAND *v.* COMMISSIONERS OF INLAND REVENUE.

*Revenue—Stamp Duty—Settlement—Policy of Life Insurance—Covenant for Payment of Premiums—Provision for keeping up Policy—Stamp Act*, 1891 (*54 & 55 Vict. c.* 39), *s.* 104.

Where money to become due or payable under a policy of life insurance was "settled" by an instrument dated in 1894, which contained no provision for keeping up the policy, but the policy was in fact protected by a covenant, still applicable, for the payment of the premiums, such covenant being contained in a previous instrument executed when the policy was effected in 1892 :—

*Held*, that provision was "made for keeping up the policy" within the meaning of the proviso 2 (*a*) to s. 104 of the Stamp Act, 1891, and that, for the purpose of stamping the instrument of 1894, the ad valorem duty was chargeable in respect of the full amount of the policy moneys, and not only on the value of the policy at the date of the instrument.

It is not necessary for the purpose of the sub-section that the provision should be contained in the particular instrument which is sought to be charged with duty.

Decision of Hamilton J. on this point, [1911] 2 K. B. 343, reversed.

Appeal from the decision of Hamilton J. (1) upon a case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

The case is set out in the report in the Court below. The question arising upon the appeal was on what sum stamp duty was payable in respect of an indenture dated December 19, 1894. As to this deed Hamilton J. had held that money which might become payable upon a policy of life insurance was "settled" by it within the meaning of s. 104 of the Stamp Act, 1891, and that the indenture was, therefore, chargeable with stamp duty under that section. There was no appeal from that part of his decision; but he had held further that, as no provision was made in the indenture itself for keeping up the policy, sub-s. 2 (*a*) of s. 104 applied, and the duty was chargeable only on the value of the policy at the date of the

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indenture, and not upon the full amount of the policies. Against that part of the decision the Commissioners appealed.

The facts appearing upon the case, shortly stated, were as follows.

By a settlement executed in 1892 and made by the Duke of Northumberland, Earl Percy, his son, and Lord Warkworth, his grandson, the family estates were settled upon such trusts and to such uses as the settlors should jointly appoint, and in default of appointment to the use of the Duke for life, with remainder to Earl Percy and Lord Warkworth successively for their respective lives with remainders over in strict settlement. By another indenture of the same date certain policies of insurance on the life of Lord Warkworth, and all moneys to become payable thereunder, were assigned to trustees to hold upon the trusts of the settlement applicable to the proceeds of sale of the family estates, if sold. By this indenture Earl Percy covenanted with the trustees that he would during his life, if he should survive the Duke, pay the premiums on the policies, and also that his executors and administrators would pay the same so long as the Duke should live if Earl Percy should predecease the Duke. Both these indentures were duly stamped. By the above-mentioned indenture of December 19, 1894, the settlors, in exercise of their joint power, appointed part of the estates to the use of the Duke for life and the remainder to such uses as Earl Percy and Lord Warkworth should jointly appoint, and in default of appointment to the use of Earl Percy for life by way of restoration of his life estate as subsisting immediately before the execution of the indenture of 1894, but so that it should be an estate in possession and not in remainder, with remainder to the use of Lord Warkworth for life with remainders over in strict settlement. By the same indenture the settlors further declared and appointed that for the purposes of the policy settlement of 1892 the trusts of the indenture of 1894 should be the trusts upon which the policy moneys should be held. The indenture of 1894 contained no provision for keeping up the policies.

Sect. 104, sub-s. 1, of the Stamp Act, 1891, provides that an instrument whereby any money which may become due upon any policy of insurance is settled shall be charged with ad

valorem duty in respect of that money. "(2.) Provided as follows: (*a*) Where, in the case of a policy, no provision is made for keeping up the policy, the ad valorem duty is to be charged only on the value of the policy at the date of the instrument."

*Austen-Cartmell* and *W. Finlay* (*Sir Rufus Isaacs, A.-G.*, with them), for the appellants. The question depends solely on s. 104 of the Stamp Act, 1901. Hamilton J. has held that the proviso applies because there was no provision for keeping up the policy in the settlement of 1894, though there was such a provision in the settlement of 1892 which was still in force. He has held that the deed of 1894 was a settlement of the policy moneys and required a stamp, but that the stamp duty was only payable on the value of the policies in 1894, which was 2800*l.*, and not on the moneys assured, which amounted to 98,473*l.*, because there was no new provision for keeping up the policies in the deed of 1894. But the provision in the deed of 1892 was still in force. It was an ambulatory clause for the benefit of all persons beneficially entitled and ought to be treated as a part of the settlement of 1894. The learned judge's decision reads the proviso as if it ran "no provision is made *by the same instrument* for keeping up the policy," but this is to introduce words which are not there. The burden is on the persons claiming the exemption to prove that they come within it.

*Danckwerts, K.C.*, and *Tomlin*, for the respondent. The only point before the Court is whether the case comes within the words of the proviso contained in the Act. The duty is payable on the instrument, not on the transaction. Duty has already been paid in respect of the covenant in the deed of 1892 and cannot be payable again. If the appellants are right any covenant by a third party to keep up the policy, whenever entered into, would make the duty payable on the amount insured. The construction adopted by Hamilton J., that the provision for keeping up the policy must be made by the same instrument, or that it must be made on the occasion of the settlement, is correct. In this case there was no such provision. If the appellants are right the existence of any former covenant ought to be stated in the settlement under s. 5 of the Stamp Act,

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1891, as "a circumstance affecting the liability of the instrument to duty," but that is absurd. Upon the proper construction of the covenant in the policy deed of 1892 there was in effect no obligation upon anybody to keep up the policies until after the death of the Duke. The covenant is by Earl Percy during his life "if he should survive the Duke," so that in fact only a qualified provision was made for keeping up the policies. But if this construction is wrong the "provision" referred to in s. 104, sub-s. 2 (*a*), is an express provision made in the deed itself which is sought to be charged with duty. The expression "is made" in the proviso must be construed according to its natural meaning, i.e., in præsenti.

COZENS-HARDY M.R. This is an appeal from the decision of Hamilton J., and the point is really a simple one, but it deserves some consideration. The Northumberland estates were at all relevant times settled upon the Duke of Northumberland for life, his eldest son Lord Percy for life, his grandson Lord Warkworth for life, and with remainders over. In 1892 there was a resettlement, and it appears from the terms of the deed itself—which I call the policy deed—that Earl Percy and Lord Warkworth were minded to follow the precedent of their predecessors and to provide a fund by means of policies so as to relieve the settled estates from burdens, whether for portions or other charges as the case might be. By the deed, to which Earl Percy and Lord Warkworth were parties of the one part and two trustees were parties of the other part, it is recited, as the fact was, that policies to a very large amount, I think roughly 98,000*l*., which are in the schedule to this deed, had been effected by Lord Warkworth on his own life, and provision is made by this deed for keeping up these policies, and the covenant is expressed in words which I will read presently, but before getting to the covenant itself it is provided that the policies are to go as though they were capital moneys under the settlement, reading it very shortly, and there may be some slight exceptions, but practically that is what it means. Then we have this covenant. Earl Percy covenants with the trustees that he will during his whole life,—I put in the word "whole" there—if he shall survive the Duke of

Northumberland, duly and punctually pay the annual premiums and other sums necessary for keeping on foot the policies of assurance, and also that his executors and administrators will pay the same so long as the Duke shall live if Earl Percy shall die during the lifetime of the Duke. So that there are positive covenants by Earl Percy as to what he will do during his whole life and what his executors will do after his death, that is to say, there is an obligation upon Earl Percy and upon his estate to keep up these policies until the policies themselves come to an end by reason of the death of Lord Warkworth. Now on the construction of this deed we have been asked by Mr. Danckwerts to hold that there was no obligation at all upon anybody to keep up the policies until after the death of the Duke. That seems to me to be an absolutely impossible construction. I quite agree that the draftsman of the deed of covenant might have worded it better; but to my mind it is impossible to contend that Earl Percy's executor's are liable during the whole life of the Duke to pay the premiums on these policies, but that Earl Percy himself was under no liability to pay one penny until after the death of the Duke. That is not how I read the covenant. To read it in the way suggested would absolutely render the deed ineffective and almost useless, because the policies would not be available as a fund for the very purpose for which they were taken out. The covenant is a covenant by Earl Percy to take effect from the moment of the execution of this deed. It is to continue not merely during the life of the Duke, but during the rest of the life of the Earl if he survived the Duke, and after his own death the executors of Earl Percy are liable, out of his estate of course, to pay the premiums until Lord Warkworth's death.

In my opinion, therefore, this is a deed under which, to use a phrase which is found in one or more of the authorities, the policies were fortified by Earl Percy's covenants, which were operative from the date of the deed until the death of Lord Warkworth.

That being the state of things, in 1894 there was a further instrument executed, as to which Hamilton J. has held that it is a settlement within the meaning of s. 104 of the Stamp Act. There is no appeal against that decision, and I do not

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propose to say, nor would it be well for me to say, one word to the contrary, but certainly it must not be for a moment assumed that I have formed any opinion adverse to the view that Hamilton J. put upon it. We therefore have a settlement executed in 1894 of these policies. The question is, on what sum is duty payable? That turns upon the meaning of s. 104 of the Stamp Act, which says: "Where any money which may become due or payable upon any policy of life insurance, or upon any security not being a marketable security, is settled or agreed to be settled"—that was done in 1894—"the instrument whereby the settlement is made or agreed to be made is to be charged with ad valorem duty in respect of that money." So that we have a settlement in respect of which ad valorem duty is payable on the policy money, and the policy money was of course here, in round figures, 98,000*l.* The surrender value at the date of the settlement in 1894 was 2000*l.* odd. That enactment is followed by a proviso: "Provided as follows: (*a*) Where, in the case of a policy, no provision is made for keeping up the policy, the ad valorem duty is to be charged only on the value of the policy at the date of the instrument." Putting that into more familiar language the ad valorem duty is only to be charged on the surrender value of the policy at that date. The whole question here is whether, there being, as I hold, under the covenant in the deed of 1892 a covenant by Earl Percy to pay the premiums on these policies, the provision made in the deed of 1892 was a provision made for keeping up the policies within the meaning of that proviso. In my opinion it was. The arguments addressed to us by Mr. Danckwerts and Mr. Tomlin really involve this, that we must insert in the proviso "provided in the case of a policy no provision is made in the settlement itself for keeping up the policy." I see no ground whatever for inserting those words. I think the distinction is drawn, again using language which has been used in one or more of the authorities, between a policy fortified by a covenant, or some other means of paying the premium, and a policy not fortified by any such covenant.

In my opinion it does not matter whether the covenant is found in the settlement itself or the settlement is of a policy

which is by contract protected by a covenant to pay the premium. With great respect to Hamilton J., from whose decision on this part of the case I am differing, I think he has taken too narrow a view of the language of s. 104, sub-s. 2, and in the present case the answer ought to be that the duty is assessable on the amount of the policies.

FARWELL L.J. I am of the same opinion. It appears from the recital that Lord Warkworth had effected these policies, that they were to replace the moneys which he had power to charge upon the estate by way of portions for younger children and so on, and that Earl Percy and Lord Warkworth were minded to follow the precedent set on the occasion of the resettlement in 1868 by the then Duke and Earl, and to provide a fund to clear the estates. Then there is a recital that the policies on the life of Lord Warkworth had been effected by him in his own name but at the expense of Earl Percy, and then there is an assignment by Lord Warkworth in consideration of the covenant by Earl Percy. Now certainly the conveyancer has bungled in his phraseology, but I think it is impossible to read the words of the covenant by the Earl that "he will during his life if he shall survive the said Duke of Northumberland" as equivalent to "during so much of his life as shall remain after the death of the Duke of Northumberland." It is impossible on reading together the two covenants by the Earl and by his executors, the executors being expressly directed to pay during the lifetime of the Duke, to suppose that the policies were to remain without any one being bound to keep them up during the joint lifetime of the Earl and the Duke, who is not a party to this deed, and therefore could not by any possible implication be supposed to be bound to pay them himself, and the only possible construction is that put upon it by the Master of the Rolls.

As regards the second point and the words in sub-s. (*a*) "provision is made for keeping up the policy," those words do not necessarily mean a covenant in the settlement to pay the premiums. If there is a pre-existing covenant, and the settlement assigns directly, or by implication of law, the benefit of such covenant, such assignment is, in my opinion, a provision for

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keeping up the policies within that sub-section. The provision must obviously mean for the benefit of the beneficiaries under the settlement or resettlement in question. For instance, if the resettlement in 1894 had expressly released Earl Percy from the covenant, or if on construction the benefit of the covenant had not passed, or if in 1892 there had been a covenant between the Duke and the Earl unenforceable by the trustees or beneficiaries under the settlement of 1892, there would, in my opinion, then be no case for this extra ad valorem tax under sub-s. (*a*). But in substance the difference is between the secured or the fortified policy, to use the Master of the Rolls' phrase, and the unfortified policy. The duty is imposed on the settlement which the learned judge has held in this case to be the resettlement of 1894, and it is only a question of amount, which is dependent on the fact whether the policy so settled is fortified or unfortified. The policy as originally settled was a fortified policy. The same policy is now resettled with the benefit of the same fortifying covenant. In my opinion, therefore, by the resettlement provision is made for keeping up the policy, and it is therefore liable to the same tax.

KENNEDY L.J. I agree, and for the same reasons.

*Appeal allowed.*

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondent: *May, How & Chilver.*

G. A. S.

[IN THE COURT OF APPEAL.]

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*July* 26.

## LANSTON MONOTYPE CORPORATION, LIMITED *v.* ANDERSON (Surveyor of Taxes).

*Revenue—Income Tax—Average Profits and Gains—Deduction—Patent—Royalty—Royalty ceasing to be payable—Finance Act*, 1907 (7 *Edw.* 7, *c.* 13), *s.* 25, *sub-s.* 1.

The provision in s. 25, sub-s. 1, of the Finance Act, 1907, that "in estimating under any schedule of the Income Tax Acts, the amount of the profits and gains arising from any trade, manufacture . . . . no deduction shall be made on account of any royalty, or other sum, paid in respect of the user of a patent" does not apply where, by arrangement between the person owning and the person using the patent, all royalties and other sums in respect of the user thereof have ceased to be payable before the year of assessment.

Decision of Hamilton J., [1911] 2 K. B. 15, reversed.

Up to January 1, 1907, the Lanston Monotype Corporation, Limited, paid royalties for the user of certain patents without deducting income tax, and on that date, by arrangement with the owners of the patents, these royalties ceased to be payable. The company had hitherto been assessed on the average of three years ending on September 30 preceding the year of assessment in each case, and were allowed in arriving at each year's assessment by way of deduction the amount of the royalties which they had paid during the three years of average. The surveyor of taxes now contended that under s. 25, sub-s. 1, of the Finance Act, 1907, no deduction must be made on account of the royalties in estimating the average. The company maintained that the sub-section must be read as one enactment and that, inasmuch as they paid no royalties in the year of assessment, they were still entitled to deduct the royalties which they had paid in the three years of average. The Commissioners were of opinion that the contention of the Crown was correct and confirmed the assessment, but stated a case for the opinion of the High Court; and Hamilton J. also decided in favour of the Crown. The case is reported ante, p. 15, where the facts are more fully stated and the sections referred to are set out.

The company appealed.

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*Danckwerts, K.C.*, and *Austen-Cartmell*, for the appellants. The question turns on the construction of s. 25, sub-s. 1, of the Finance Act, 1907. It is submitted that that sub-section places no fresh burthen on the appellants. The first part of the sub-section enacts that no deduction shall be made on account of any royalty, but the second part provides that that shall only be enforced where the person who pays the royalties can retain thereout the amount of the income tax. The appellants have already paid in full the royalties for the three years on the average of which they are assessed and cannot deduct or retain the income tax from them; therefore s. 25, sub-s. 1, does not apply to them, and they are still entitled to deduct from their profits the amount of the royalties paid in those years. Otherwise the Crown will exact the tax twice, first from the owners of the royalties and then from the appellants, and it cannot be supposed that that was the intention of the Legislature in an enactment which is only providing machinery for facilitating the collection of the tax by extending the principle of taxing at the source: *London County Council* v. *Attorney General*. (1) The sub-section is not retrospective, but prospective, and applies only to royalties payable after the date when the Act came into force; and here there are no royalties payable after that date. The royalty which is not to be deducted is one from which it is competent for the user of the patent to deduct income tax. The two limbs of the sub-section are not independent, but must be read together, and the operation of the whole provision is future only: *Knight* v. *Lee*. (2) It is true that the royalty owners are foreigners and may not have paid the tax, but no objection is raised on that ground.

*Sir J. Simon, S.-G.*, and *W. Finlay*, for the Crown. The system of calculation by averages of three years may sometimes result in injustice, but that is the fault of the system and does not affect the construction of the Act. For instance, if a man's profits are steadily declining he is continually paying tax on a larger income than his real income; but that is inherent in the system and cannot be avoided. Sect. 25 of the Finance Act, 1907, is a continuation of the rules under Sched. D contained

(1) [1901] A. C. 26, 43. (2) [1893] 1 Q. B. 41.

in s. 100 of the Income Tax Act, 1842, and is not retrospective, although a man now finds himself in an altered position, as he did under the Act of 1842, when for the first time he was taxed on an average of past years. The Act of 1907 follows s. 102 of the Act of 1842 and assimilates the treatment of royalties to that of persons who have borrowed money and paid interest on it and under the fourth rule were not allowed to deduct the interest. The sub-section must be construed by its language; objections to the system are irrelevant. It cannot be assumed that the first part of s. 25, sub-s. 1, is limited in any way. It is enacted in the most general way that no deduction shall be made on account of any royalty. The subsequent words do not contain any exception, and it is immaterial that the person paying the royalties has put it out of his power to deduct the tax.

No reply was called for.

COZENS-HARDY M.R. With great respect to Hamilton J. I am unable to concur in the view which he has expressed as to the true meaning and effect of s. 25, sub-s. 1, of the Finance Act, 1907. The object of the sub-section was, no doubt, to effect a change in the law, and to tax at their source sums payable to a patentee in respect of royalties. The material facts are exceedingly simple. The appellant company here made large profits to a great extent by paying very considerable sums in respect of royalties on patents. It happens that they were paid to a foreigner, but nothing turns upon that. On taking the three years average the company proceeded upon the footing that they were entitled to deduct the full amount of the royalties which, according to the then state of the law, they were authorized to deduct as sums properly paid in respect of the carrying on of the business. Then came this Act, s. 25, sub-s. 1, of which says: "In estimating, under any schedule of the Income Tax Acts, the amount of the profits and gains arising from any trade, manufacture, adventure, concern, profession, or vocation, no deduction shall be made on account of any royalty, or other sum, paid in respect of the user of a patent, but the person paying the royalty or sum shall be authorised, on making the payment, to deduct

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and retain thereout the amount of the rate of income tax chargeable during the period through which the royalty or sum was accruing due." It seems to me as a matter of fair construction that that is one scheme dealing with the future—"no deduction shall be made," "but the person paying the royalty or sum shall be authorised, on making the payment, to deduct and retain thereout the amount of the rate of income tax chargeable during the period through which the royalty or sum was accruing due." It is not at all the same, as it seems to me, as the fourth rule under the Act of 1842, where there is a distinct charging section, and then a provision made for collecting the tax at its source. Here, according to the fair reading of the section, it does seem to me that the Crown is not entitled to say to the appellants "You shall not be entitled, in estimating your profits, to claim any deduction on the average of three years for the sums you in fact paid for royalties," although at the same time the Crown admits that they cannot gain any benefit from the qualifying part of the same sub-section—"but the person paying the royalty or sum shall be authorised, on making the payment, to deduct and retain thereout the amount of the rate of income tax chargeable during the period through which the royalty or sum was accruing due."

I am of opinion, with great respect to Hamilton J., that he has failed to give due weight to the fact that this is all one sub-section and not two sub-sections. There is no justification for claiming against the present appellants income tax on the footing that they were not entitled during the three years prior to the coming into force of this Act to deduct the royalties which in fact they paid.

I think this appeal should be allowed.

FARWELL L.J. I am of the same opinion. I think it is plain that this is a section for the improvement of the machinery for collecting the tax, and not a charging section at all, and that, on the true construction of it, the words "any royalty or other sum paid in respect of the user of a patent" are necessarily confined to the royalty or sum which is spoken of two lines below, on making payment of which the person paying is entitled to deduct.

Inasmuch as the Crown was entitled to and has, I presume, received from the patentee or the royalty owner the income tax on the royalty for the two former of the three years in question, it certainly does seem harsh, to say the least of it, to exact it over again from another person, and I do not think that the Legislature so intended. It is sufficiently hard on the trader to have to bring in these sums, which would appear to be ordinary deductions from profits as necessary outgoings, as part of his income, with the possible result that he pays income tax on an income which he never made at all. If, for example here, the royalty in one year had been 5000*l.* and the profits had been 4000*l.*, the appellants would have had to pay on 4000*l.* although they made a loss of 1000*l.* If the Act says so, there is an end of it, but in the absence of perfectly clear language I decline to hold that in estimating the amount on which the tax is to be charged for the three years return the royalty on the former years which are past and gone and in respect of which nothing can now be claimed from the royalty owner, and on which the royalty owner has already paid tax to the Crown, is to be reckoned in again. Such a construction appears to me to be contrary to every principle of justice and contrary to reason.

With the greatest respect to Hamilton J. I cannot agree with this conclusion, and I think the appeal must be allowed.

KENNEDY L.J. I am of the same opinion. It seems to me, on the statement of the points on both sides contained in the careful judgment of Hamilton J., the true view is expressed in what he puts first as the contention of those who are appellants here—that the object of the section is to provide for the tax on payment of the royalties by deduction. I differ from him when in concluding the case and summing up the views he treats the contention of the appellants as being one which involves a virtual reconstruction of the section. To my mind the natural construction of the section is to read the whole of the one sentence as it stands in its entirety. The second portion of the sentence is an integral part of the whole, connected as it is by the word "but." This connection shews to my mind that it is

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intended only to deal with a case in which the second half of the sentence can be brought into effect.

*Appeal allowed.*

Solicitors for appellants: *Bristows, Cooke & Carpmael.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

H. C. R.

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*March 22, 24.*

## SOCIÉTÉ COLONIALE ANVERSOISE (SOCIÉTÉ ANONYME) AND SOCIÉTÉ ANONYME DES MINES DE MANGANESE D'OURO-PRETO *v.* LONDON AND BRAZILIAN BANK, LIMITED.

*Banker — Account opened by Principal in Name of Agent—Revocation of Agent's Authority to draw on Account — Liability of Banker to pay undrawn Balance to Principal.*

*Semble*, per Scrutton J., that a principal who pays money into a bank to the account of a person known to the bank to be his agent upon the terms that the agent shall have authority to draw upon the account has the power, if he rightly determines the agency and revokes the authority of the agent to draw upon the account, to require the bank to return any undrawn balance to him.

ACTION tried in the Commercial Court before Scrutton J without a jury.

The plaintiffs claimed to recover from the defendants, the London and Brazilian Bank, Limited, a bank trading in London and Brazil, the sum of 772*l.* 8*s.*, being the unexpended balance of a sum deposited with the defendants by the plaintiffs.

The following statement of the facts is taken from the judgment of the learned judge:—

In this case the plaintiffs, a company owning mines in Brazil, claim from the defendants, a bank trading in London and Brazil, the sum of 772*l.* 8*s.*, being the unexpended balance of a sum given to the defendants by the plaintiffs under the following circumstances:

The plaintiffs had provided money for their mines in Brazil by remitting through the defendants moneys which were drawn on by Messrs. Haupt & Co., their commercial agents there.

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A Mr. Kloz was the managing director of their mines, and in April, 1909, the plaintiffs desired to make remittances on which he also should draw for mining expenses. The following correspondence accordingly took place: On April 3, 1909, the plaintiffs wrote to the defendants, saying, "In future the amounts we shall remit to you to be cabled out to your branch office at Rio de Janeiro for the disposal of Messrs. Haupt & Co. must partly be held at the disposal of these gentlemen and partly at the disposal of our managing director of the mines, Mr. Ludwig Kloz. We shall always indicate you which amount is for Mr. Kloz and which amount is for Messrs. Haupt & Co. Please transmit these instructions to your branch office at Rio de Janeiro and oblige." To which the defendants answered on April 5, "Please say if you mean the Mines de Manganese d'Ouro-Preto." The answer from the plaintiffs on April 30 enclosed a number of cheques, and then instructed the defendants to "cable this amount out to your branch office at Rio de Janeiro with instructions to hold—(1.) at the disposal of Messrs. Haupt & Co. at Rio de Janeiro the sum of 2000*l.*; (2.) at the disposal of Mr. Ludwig Kloz, director of the Société Anonyme des Mines de Manganese d'Ouro-Preto, Cocuruto, 2600*l.*—together, 4600*l.*; and that we wish these gentlemen to have the control of conversion of this sterling amount."

I have no doubt from those letters that the bank understood, and that every business man would understand, that the plaintiffs were providing funds for their managing director to spend in expenses at their mines. Thereupon the defendants sent to their Rio branch the telegram of May 1: "Advise and pay Haupt & Co. 2000*l.* account Société des Mines de Manganese d'Ouro-Preto as usual. Advise and pay Ludwig Kloz 2600*l.*" This telegram did not, in my view, correctly express the instructions they had received, which were to allow certain funds provided by the plaintiffs in London to be drawn upon in Brazil by Kloz, the managing director of their mines. The Rio branch thereupon opened an account in the name of Kloz. Three other similar remittances were made and paid by the Rio branch into this account. No other sums were ever paid by Kloz into the account, but he drew out from time to time certain sums. A

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receipt for one of these sums was produced at the trial in which he acknowledged having received the sum on account of his company.

At the beginning of August, 1909, Kloz was dismissed by the plaintiffs and, as between himself and the plaintiffs, ceased to have any right to draw any further sums out of the funds they had remitted. There was at this time 772*l.* odd in the account, and the plaintiffs claimed its transfer to Haupt & Co.'s account. The following correspondence took place: On August 6 the plaintiffs wrote to the defendants, saying, "We beg to confirm our this morning's telegram as follows: 'Cable immediately Rio stop all payments Kloz for our account and transfer amount to credit Biehnouro'"—that is to say, to Haupt & Co.—"from which you will have understood that we asked you to immediately cable out the necessary instructions to your Rio branch in order that they should stop all payments to our manager there, Mr. Kloz, and to transfer the amount we recently asked you to remit to Mr. Kloz to the credit of our agents, Messrs. Haupt & Co. We hope you will have acted accordingly and shall be pleased to hear from you in this respect."

On the same date the defendants wrote to the plaintiffs: "We are in receipt of your telegram of this date reading as follows: 'Cable immediately Rio stop all payments Kloz for our account and transfer amount to credit Biehnouro,' which had our immediate attention, and we cabled to our Rio de Janeiro branch as follows: 'Stop payment all amounts Kloz for account of Société des Mines de Manganese d'Ouro-Preto. Transfer to the credit of Biehnouro.' The cost of our telegram is 2*l.*, which kindly remit at your convenience."

A telegram was sent as stated by the defendants, and the Rio branch on August 7 wrote to the London office: "Referring to your telegram of 6th instant, we had already credited Ludwig Kloz's account with the 2550*l.* at 15$\frac{1}{8}$ and paid his cheque for R.35,000$000 to Messrs. Haupt & Co. As instructed, we have transferred the balance of his account, say, R.12,468$500, to credit of Société des Mines de Manganese d'Ouro-Preto." Then there is a letter of August 27 from the defendants to the plaintiffs: "Referring to your telegram of the 6th instant and to

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ours sent in accordance therewith to our Rio de Janeiro branch to stop payment of all amounts to Kloz for your account, and to transfer to the credit of 'Biehnouro,' we beg to inform you that our above branch write us (when acknowledging receipt of our telegram) as follows: 'We had already credited his (Ludwig Kloz's) account with the 2550*l.* at 15⅛ and paid his cheque for R.35,000$000 to Messrs. Haupt & Co. As instructed we have transferred the balance of his account, say, R.12,468$000 to the credit of Société Anonyme des Mines de Manganese d'Ouro-Preto.'" On August 6 the Rio branch appear to have paid a large cheque in favour of Haupt & Co., about which no question was raised in this action, leaving a balance in their hands of about 12,468 milreis, or approximately 772*l.* (1)

Kloz, however, protested to the Rio branch, and on August 12 he wrote: "I am in receipt of your favour of 9th instant in which you inform me that you had transferred the balance of my current account amounting to R.12,468$500 to the account of the Société Anonyme des Mines de Manganese d'Ouro-Preto. I cannot conform to this, and claim that this sum standing to my credit in personal name can only be retired by myself and consequently request you to hold this amount at my disposal until I have settled matters with the above company."

Then the bank changed their mind and declined to pay the money to the plaintiffs. On August 17 the Rio branch wrote to the London office: "Referring to ours of the 7th August, we have received a letter from Mr. L. Kloz, as per enclosed press copy, protesting against the balance of his account being transferred to the Société Anonyme des Mines de Manganese d'Ouro-Preto. As the payments, as far as we are concerned, were ordered in favour of Ludwig Kloz and credited to an account opened with us in his private name, the company cannot recover the amount without his consent or without judicial intervention. Mr. Kloz informs us that he does not wish to cause us any unpleasantness, but objects to us returning the money until he has settled accounts with the company. Will

(1) The actual amount appears to have been 779*l.* 5*s.* 7*d.* The rate of exchange on August 6, 1909, was taken to be 15*d.* per milreis. The amount claimed on the writ was, however, 772*l.* 8*s.* as stated above.

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you please inform the company that we have reversed the entries referred to in our letter of 7th instant and that we shall find it difficult to refuse payment of the amount to Mr. Kloz should he at any time claim it? If the company still insist on recovery of this sum they must send their representatives at Rio a power of attorney to legally embargo the amount and so relieve us of all responsibility in the matter."

On October 18, after considerable correspondence, the defendants in London wrote to the plaintiffs: "We can only refer you to our letter of 6th ulto., transcribing an advice received from our Rio de Janeiro branch giving the only legal method by which you can be empowered to receive the balance of Mr. Kloz's account. The funds were specifically transferred by you to Mr. Kloz personally, and as we have strictly carried out your instructions we cannot accept any responsibility in the matter." Kloz had never attempted to draw on the money nor had he taken any legal proceedings in Brazil to stop the bank paying it to the plaintiffs, or to obtain it, but he did in January, 1910, take proceedings in Belgium in which he claimed certain expenses and commissions, but gave no credit for this balance at Rio.

*M. Shearman, K.C.*, and *W. J. Disturnal*, for the defendants. The moment the plaintiffs gave the defendants authority to honour Kloz's cheques, Kloz was the customer of the defendants and the authority given by the plaintiffs was irrevocable. The defendants issued a cheque-book to Kloz. The relation between banker and customer is that the money paid into the customer's account becomes the property of the banker, who is a debtor to the customer for that amount and bound to honour his cheques: *Foley* v. *Hill* (1); *Milroy* v. *Lord* (2); *Goodwin* v. *Robarts* (3); *Pott* v. *Clegg*. (4) The defendants' position was not altered by notice that their customer Kloz was merely holding the money as agent for the plaintiffs. If the plaintiffs had paid the money into their own account with instructions to the defendants to allow Kloz to draw upon it the case would have been different.

(1) (1848) 2 H. L. C. 28.
(2) (1862) 4 D. F. & J. 264.
(3) (1875) L. R. 10 Ex. 337.
(4) (1847) 16 M. & W. 321.

The plaintiffs would have been the customers of the defendants and could have revoked the authority of Kloz to draw upon the account at any moment; but immediately Kloz became the defendants' customer his authority to draw upon any balance standing to his account was irrevocable. *Calland* v. *Loyd* (1) is distinguishable. In that case the money paid in was in law stolen money, in the present case the plaintiffs had a title to the money. An embargo can only be placed on money standing to the customer's account by means of an application to a Court: *Tassell* v. *Cooper*. (2) The decision in *Sims* v. *Bond* (3) is inconsistent with the other authorities. In that case it was erroneously assumed that money paid into a customer's account does not become the property of the banker. The defendants were at the mercy of any cheques Kloz chose to draw. Kloz had all the ordinary authority of a customer over the account, and the defendants were liable to him. The ordinary doctrine that a principal can give notice of the revocation of an agent's authority does not apply where a banking account is opened in the agent's name. The agent's authority to draw on the account is, so far as the banker is concerned, irrevocable.

*Bailhache*, *K.C.*, and *F. D. Mackinnon*, for the plaintiffs. The defendants knew that the money placed to the account was at the disposal of the plaintiffs' agent Kloz, in his capacity of agent only. Whether an account is opened in the name of the principal or agent, the principal has the right to determine it provided that the bank knows who the principal is, that the money is his, and that it is at the agent's disposal in his capacity of an agent: *Calland* v. *Loyd*. (1) The reasoning on which the decision in *Tassell* v. *Cooper* (2) was based is in favour of the plaintiffs although the judgment itself is not. In that case the bailiff being in possession of the cheque paid it into his own banking account. In the present case the plaintiffs, not Kloz, were the creditors of the defendants. The moment the defendants knew that Kloz's agency had been determined by the plaintiffs the authority of the defendants to pay Kloz was

(1) (1840) 6 M. & W. 26. (2) (1850) 9 C. B. 509.
(3) (1833) 5 B. & Ad. 389.

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determined. The only cases in which the defendants would have been under an obligation to account with Kloz would have been if the plaintiffs had given the money to Kloz or if Kloz was a creditor of the plaintiffs. As neither of those conditions existed the defendants are liable to account to the plaintiffs for the sums they have received. [*Ireland* v. *Livingston* (1) was also referred to.]

*Cur. adv. vult.*

March 24. The following judgment was read by

SCRUTTON J., who, after stating the facts substantially as above set out, continued:—

In my view the plaintiffs are entitled to judgment. The position taken by the defendants on August 6 was the correct one. A principal who had furnished money on which a person whom the bank knew to be an agent was to draw for the purposes of his agency revoked the agency and requested the bank to hand over the undrawn balance. I am unable to understand on what principle the bank can refuse to pay the balance to the principal who furnished them with the money and claim to pay it to the agent whose authority to draw has been revoked.

I see no justification in their instructions for the bank's opening an account in Kloz's name; they are to allow him to draw on a sum provided by the plaintiffs. But if these instructions are not sufficiently precise to prevent them from opening an account in his name, in my opinion it makes no difference. When a principal places money in the bank on the terms that a known agent shall draw upon it he retains, in my view, the power, if he rightly determines the agency, to require the bank to return the undrawn balance to him.

Certain cases were referred to at the hearing, of which *Tassell* v. *Cooper* (2) was mostly in favour of the defendants, while the judgment of the Court in *Sims* v. *Bond* (3) and *Calland* v. *Loyd* (4) appeared against them. But it is to be observed that in *Tassell* v. *Cooper* (2) the agent had paid certain money into his general account; the bank's contract was therefore with him, and not

(1) (1872) L. R. 5 H. L. 395.
(2) 9 C. B. 509.
(3) 5 B. & Ad. 389.
(4) 6 M. & W. 26.

with his employer, to whom he ought to have paid the money. In the present case it is the employer who has paid all the money into the agent's account and has withdrawn the authority to draw of the person whom the bank knew from the first to be an agent. There must be judgment for the plaintiffs with costs.

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*Judgment accordingly.* (1)

Solicitors for plaintiffs: *W. A. Crump & Son.*
Solicitors for defendants: *Bircham & Co.*

J. E. A.

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[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1911 *Jan.* 16, 24.
C. A. *May* 3, 4, 24.

## CLAYTON *v.* LE ROY.

*Sale of Goods—Market Overt—Custom of the City of London—Shop—Auction Room—Detinue—Trover—Demand and Refusal before Writ.*

The plaintiff's watch, which had been bought some years previously at the defendant's shop, was stolen from the plaintiff, who gave information of the theft to the defendant. The watch was pledged with a pawnbroker, and eventually, together with a large number of other unredeemed pledges, was sold by auction in a room on the first floor of a building in the city of London, which room was used solely for the sale by auction of all classes of goods. Shortly afterwards the watch was purchased in a jeweller's shop in the country by one B., who sent it to the defendant for an opinion as to whether it was a genuine antique watch. The defendant wrote both to the plaintiff and to B., telling them that it was the watch which had been stolen, and inquiring as to their wishes in the matter. No answer was sent by the plaintiff to the defendant's letter, but a few days afterwards a clerk of the plaintiff's solicitors called at the defendant's shop and, on being shewn the watch, demanded that it should be then and there handed

(1) The defendants appealed. The appeal was heard upon November 3, 1911, when the Court of Appeal (Vaughan Williams L.J., Buckley L.J., and Kennedy L.J.) dismissed the appeal on the ground that, upon the true construction of the correspondence between the parties (which included other letters and telegrams besides those set out in the judgment below), Scrutton J. was right in holding that the defendants were not justified by their instructions in opening the account in the name of Kloz, and they expressed no opinion on any other point.—E. L.

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over to him, and, on this request being refused, at once served the defendant with a writ in detinue which he had taken out on behalf of the plaintiff about two hours previously :—

*Held* by Scrutton J., that the auction room was not a shop within the meaning of the custom of the city of London, according to which a sale in a shop in that City of such goods as are usually sold in it is a sale in market overt.

*Held* by the Court of Appeal (Fletcher Moulton L.J. and Farwell L.J., Vaughan Williams L.J. dissenting), without deciding the question of market overt, that upon the facts given in evidence there had been no wrongful refusal on the part of the defendant to return the watch to the plaintiff before the date of the issue of the writ, and that the plaintiff had no cause of action against the defendant either in detinue or in trover.

TRIAL before Scrutton J. without a jury.

The action was for detinue of a watch. In 1902 the wife of the plaintiff, Major Edward Clayton, bought from the defendant, a jeweller carrying on business in New Bond Street under the name of Le Roy et Fils, a Breguet watch, which she gave to her husband. In 1908 the watch was stolen from the plaintiff while staying at Cannes. The plaintiff gave information of the theft to the defendant. The watch was subsequently pawned with some pawnbrokers in the Strand, by whom it was eventually sent to be sold by auction with other unredeemed pledges by Messrs. Johnson, Dymond & Son at the "City Auction Rooms" in Gracechurch Street. It was bought at the auction in November, 1909, by a Mr. Phillips, through whom it passed to a Mr. Bennett. In May, 1910, Mr. Bennett sent it to the defendant for an opinion as to its genuineness, and the defendant recognized the watch as the one which he had sold to Mrs. Clayton. The defendant accordingly wrote to Mr. Bennett the following letter :—"57, New Bond Street, May 11, 1910. Dear Sir,—I beg to acknowledge receipt of your pedometer watch, and it is of course quite genuine. Directly I saw it I recognized it as the watch stolen from my customer some years ago, about which I told you. I have also referred to the old books and find the number of it was 195. There is therefore no possible doubt about its being the same watch. It places me in a difficult position, as I do not see how I can do otherwise than acquaint my customer with the facts. It was stolen a good many years ago, I think about eight or nine, so I should think there can be no legal claim against you. Will

you kindly let me know what you think about it before I write to the customer, and also tell me how much you would take for the watch if I can buy it from you. I remain, Sir, your obedient servant, M. Le Roy." He received the following answer:—"Westlands, Grimsby, May 12, 1910. Dear Sir,—I received your letter this morning and am very much surprised to hear that my Breguet pedometer watch is also a stolen watch. . . . . If the watch has really been stolen I shall be only too pleased for you to restore it to the original owner provided he will pay me the price I gave for the watch, namely 44*l.*, and 3*s.* 6*d.* for the case. I bought the watch through Mr. Burton, jeweller, 33, Victoria Street, Grimsby, who will give you any information, if you require it, on your writing him. The watch was bought at an auction sale in London last November, and I have had it since that time. In fact I was telling you about it when I called on you in January last. Yours faithfully, Henry Bennett." On receipt of that letter the defendant wrote to Mrs. Clayton as follows: "57, New Bond Street, London, May 16, 1910. Madam,—We beg respectfully to inform you that an old customer of ours has just sent us an old Breguet watch for our inspection, and upon referring to our books we find it is the pedometer Breguet watch we sold to you many years ago, and which, if our recollection is accurate, you told us was subsequently stolen from Major Clayton somewhere abroad. We believe the watch cost our customer about 50*l.* only, and we wrote to tell him it is the watch we believe was stolen from you. It is now so long ago that it would no doubt be impossible to trace the thief, but we are writing to you thinking you might like to repurchase the watch. Our customer has written to tell us that he would be willing to give it up for the price it cost him, if the person from whom it was stolen wished to repurchase the watch. Will you kindly let us know what your wishes are in reference to it. We remain, Madam, your obedient servants, M. Le Roy."

The plaintiff's solicitors, treating that letter as a refusal to deliver up the watch without payment, forthwith commenced this action. After issue of the writ the defendant definitely refused to give up the watch, and was thereupon served with the writ.

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The defence was that the sale to Phillips at the City Auction Rooms was by virtue of the custom of the city of London a sale in market overt, and that the plaintiff had consequently lost his property in the watch. The "City Auction Rooms" are auction rooms of the usual type. The proprietors sell there all classes of goods. The manager said in his evidence "We sell anything that is sent to us to sell." The first floor room in which the watch was sold is used exclusively for the sale of jewellery, watches, and plate. It is open to the public. In accordance with the practice the sale at which the watch was sold was advertised in two newspapers, and the several lots, including the watch, were on view on the two days preceding the sale.

*E. W. Hansell*, for the plaintiff.

*Atkin, K.C.*, and *C. L. Attenborough*, for the defendant. By the custom of the city of London every shop in the City is market overt for such goods as are usually sold there: *The Case of Market Overt.* (1) An auction room is a shop for this purpose. The object of the custom is to protect sales which are conducted openly. If the custom applies to a small shop, a fortiori must it apply to a large one where many customers go, such as an auction room. In Johnson's Dictionary a shop is defined to be a "place where anything is sold," and in Webster's Dictionary "a building in which goods are sold by retail." In *Lyons* v. *De Pass* (2) a warehouse in which goods were openly sold was held to be a shop within the custom. In *Wiltshire* v. *Willett* (3) an auction room was held to be a shop within the meaning of a local Act which prohibited the sale of certain articles at any place within the limits of the Act except the market or a shop attached to a dwelling-house. The question is whether the goods are sold in a place where the owner is likely to search for them, and the owner is much more likely to look for them in an auction room than in a jeweller's shop. The greater the publicity attending the sale the greater the reason for protecting it.

Secondly, the action is premature. There was no sufficient

(1) (1596) 5 Rep. 83b. (2) (1840) 11 A. & E. 326.
(3) (1861) 11 C. B. (N.S.) 240.

refusal by the defendant before writ to deliver up the watch to constitute a conversion. The detention necessary to support an action of detinue must be an adverse detention: *Clements* v. *Flight*. (1) Where as here the goods have been deposited with the defendant by a third person of whose want of title the defendant was ignorant, the mere detention of them is no conversion unless there has been a refusal to deliver them to the owner: *Spackman* v. *Foster*. (2) The letter of May 16 did not amount to a conversion. It stated that the defendant would give up the watch on certain terms; it did not say that he would not give it up on any other terms.

*E. W. Hansell* in reply. Demand and refusal is only evidence of conversion, and in certain cases it may be the only evidence. But there may be a conversion without any demand and refusal. And here there was, for the defendant was informed in 1908 that the watch had been stolen, and therefore when he received it from Bennett that receipt, not being innocent, amounted to a conversion. In *Spackman* v. *Foster* (2) the defendant when he received the deeds which were the subject of that action did not know that they were the claimant's property. In any case the letter of May 16 was a conversion. It could only mean that the plaintiff might have the watch back if he paid certain money, but otherwise not. And the refusal after issue of the writ and before service was evidence as to what that letter meant. A demand and refusal after writ may be evidence of a prior conversion: *Wilton* v. *Girdlestone* (3); *Morris* v. *Pugh* (4); and the subsequent conduct of the defendant in fighting this case on the defence of market overt is evidence of his prior intention to deprive the plaintiff of the dominion over his own watch. Secondly, the custom of the city of London has no application to this case. It applies only to the sale in a shop of such things as by the trade of the owner are put there to sell: *The Case of Market Overt*. (5) An auction room is not a shop. A shop is a place where a trader sells his own goods, not where he sells the goods of other persons on commission. An

(1) (1846) 16 M. & W. 42.
(2) (1883) 11 Q. B. D. 99.
(3) (1822) 5 B. & A. 847.
(4) (1761) 3 Burr. 1242.
(5) 5 Rep. 83b.

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auctioneer does not profess to trade in goods at all, he is only an agent. If the custom applies to this case, then the premises were market overt for every class of portable property, for the evidence was that the auctioneers sold in one or other of the rooms anything that was sent to them to sell. Such an extension of the custom would reduce it to an absurdity.

*Cur. adv. vult.*

Jan. 24. SCRUTTON J. read the following judgment:—In this case, which was tried before me without a jury, Major Clayton alleged that the defendant, who carries on business as a jeweller under the name of Le Roy et Fils in New Bond Street, detained from him an antique and valuable gold watch by Breguet, his property. The defendant replied that the watch, though stolen from the plaintiff, had by a sale in market overt according to the custom of the city of London become the property of the purchaser, one Bennett, for whom the defendant held it. The facts were as follows. About the year 1902 Mrs. Clayton bought a gold Breguet pedometer watch, No. 195, from the defendant for 100*l.* and presented it to her husband. In the spring of 1908, while in the Riviera, the watch was stolen from Major Clayton. Shortly afterwards the watch was pawned with Messrs. Cloud, pawnbrokers, in the Strand. Of course it was not redeemed; and in November, 1909, it was sold with a large number of other unredeemed pawnbrokers' pledges by public auction by Messrs. Johnson, Dymond & Son at their "City Auction Rooms," No. 38, Gracechurch Street, in the city of London. It was bought by a bona fide purchaser for 26*l.*, and by steps which I need not trace came into the hands of a Mr. Bennett, of Grimsby, who gave 44*l.* for it. On May 10, 1910, Mr. Bennett sent it up to the defendant for examination. The defendant had been told by Mrs. Clayton of the theft soon after its occurrence, and on receiving the watch and looking at his books he found it was the stolen watch. [The judge read the letters of May 11, May 12, and May 16, 1910, above set out.] In the letter of May 16 the defendant put forward a claim to hold the watch on behalf of the customer, that being in fact the attitude he has adopted down to the present day. Major and

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Mrs. Clayton were abroad, and instructed their solicitors to act. Having issued a writ, their managing clerk went to the defendant's premises and, after inspecting the watch, demanded its return to Major Clayton. The defendant refused and was thereupon served with the writ. He and his counsel complained bitterly of this treatment. I do not see what he has to complain of, as, however long he had to investigate the matter, he would still, judging by his conduct in the action, have refused to deliver up the watch. The action was brought not against the pawnbroker or auctioneer, who would apparently have had no answer to a claim for conversion, but against the defendant, because Major and Mrs. Clayton wanted to recover the watch and not its money value. The remaining facts to be stated relate to the business of Johnson & Dymond, the auctioneers, and the nature of their premises. The firm have for over one hundred years carried on the business of auctioneers in the city of London. They now do so at premises described as "The City Auction Rooms," in Gracechurch Street. From the street these premises present the appearance of an ordinary office, bearing the name of Johnson & Dymond and the words "City Auction Rooms," together with placards announcing sales of various kinds of articles, jewellery, plate, clothing, and miscellaneous effects, and, if the goods are on view, stating the fact by a red slip posted across the placard. The ground floor windows are ordinary office windows, and nothing can be seen from the street of what takes place within on the ground floor. The first floor has also large office windows, and from the street it is possible to see something of what passes on this floor—how much depends on whether artificial light is burning in the room, and how bright it is outside; but it is possible to see that watches are hanging on the wall, though of course not to identify the watches. The placards state that sales of jewellery are taking place within; otherwise I am not satisfied that people in the street can see that sales are taking place. Entering, the rooms are as shewn on a plan which was put in evidence. The ground floor, which appears to be used for the sale of "soft goods," generally old clothes, is a large empty room, entered from a passage through a doorway with no door.

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Going upstairs through the passage and a stairway, and through another doorway with no door, the first floor room is entered. As will be seen on the plan, one finds oneself faced by a circular counter with seats outside, at which apparently the bidders sit. The auctioneer's rostrum is at one end. Inside are three glass cases, in which valuable goods are placed, and a board near the window on which watches are hung and which is visible from the street. No one staying behind the counter can see the watches sufficiently to examine them, but persons well known to the auctioneer are allowed inside to examine the goods, and others, on stating what lots they wish to inspect, may have them produced by the porters. Sales of jewellery are held here three days a week—Monday, Wednesday, and Thursday or Friday. This arrangement has continued for a considerable time and is well known to the jewellery trade. The sales are advertised as sales of unredeemed pledges, pledged in particular months with particular pawnbrokers, otherwise no special description of any particular lots is advertised. Catalogues are issued by post to regular buyers and on application to others. The catalogue of this sale was not produced to me, and I do not know whether it described this watch as a Breguet watch, or how it described it. The goods are on view in the way I have described on the morning of the sale and the working day before. Messrs. Johnson & Dymond do not carry on any business but that of auctioneers, or sell any of their own goods. On these facts the defendant contended (1.), as a substantial point, that the property in the watch had been divested from the plaintiff by a sale in market overt in the city of London according to the custom of the City; and (2.), as a technical but equally good point, that, the demand by the plaintiff and the refusal being after the issue of the writ, the action must fail.

I deal first with the point of substance. By the common law of England, before it was modified by the incorporation of a rule of the law merchant, a person in possession of goods could not confer on another either by sale or pledge any better title to the goods than he himself had. It follows that if the goods had been stolen even the twentieth innocent purchaser might find himself deprived of them by the original owner. This was old German

law as well, but its strictness put a fetter upon sales in the great fairs and markets in which much of the mercantile business of the time was transacted. In the eleventh century an early German writer says that "merchants assert that sales made in fairs, whether made with proper legal forms or not, should be binding since it is their custom." By the foreign customs sometimes the real owner could get his property back by paying the merchant who had bought in a fair the price he had paid for it; sometimes he could not recover it at all, if it had been bought in an open market. In England by the common law as stated by Bracton (f. 151), if the person in possession could not produce the person who sold to him to warrant the sale, yet, if he bought publicly in a fair or market, though he lost his goods on claim by the true owner, he was free from an action of theft. But in a case in the St. Ives fair roll of 1291 Mathilda Frances was allowed to keep stolen malt on proving she had bought it in good faith in the precincts of the fair. Gradually, by steps which I fear are now untraceable, the rule of the law merchant protecting sales in market overt became incorporated as an exception on the strict common law and recognized by the King's Courts; and now s. 22 of the Sale of Goods Act, 1893, provides that "Where goods are sold in market overt according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller." The exception generally only applies to a public legal recognized fair or market. Thus in *Lee* v. *Bayes* (1), where a horse was sold by public auction in a horse repository in Southwark, no protection was given to the purchaser, because the sale was not in an open public and legally constituted market. See also *Marner* v. *Banks*. (2) But local customs might carry the protection further. "The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt:" Blackstone, Comm., vol. 2, p. 449. But in some towns their customs may extend the protection to sales outside a recognized market. The city of London is one of these favoured localities. No evidence was offered before me of its custom. It is so old and has so

(1) (1856) 18 C. B. 599.

(2) (1867) 17 L. T. 147.

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often come before the Courts that a correct statement of its extent is supposed to emerge from the consciousness of the judges. I am afraid that, were I left to myself, nothing could emerge of any value, and I am therefore thrown upon the reported cases, and especially upon *The Case of Market Overt* (1), more technically known as the case of the Bishop of Worcester, in Hilary Term of 37 or 38 Elizabeth (the reports differ in dates). The bishop prosecuted a felon at Newgate who had stolen his silver basin and ewer, and then demanded the silver from a purchaser who had bought them in a scrivener's shop in the city of London. The case came before the three heads of the Common Law Courts and other distinguished men. Popham, Chief Justice of the King's Bench, has left a report of it (Popham, 84); so has Anderson, Chief Justice of the Common Pleas (Anderson, 344). There is also a report (the longest) by Serjeant Sir Francis Moore (Moore, 360), and it appears in the 5th part of Coke's Reports, 83b, as *The Case of Market Overt.* The point decided was that the custom only applied to protect a sale of stolen goods in shops which were usual places for the sale of such goods; and it was held that a scrivener's shop was not, as a goldsmith's shop would be, a usual place for the sale of plate. The City, by their town clerk, tried to claim that the custom was wider, and that each shop was a market for all saleable things, though not usually sold there (this is only in Moore's report). I think the custom that emerges from the four reports is that every open sale in a shop or sale in an open shop in the city of London of such goods as by the trade of the owner are put there for sale is a sale in market overt. Omitting the word "open" these are substantially the terms in which Lord Coke states that as Recorder of London he had in some other case certified the custom: *The Case of Market Overt.* (1) Lord Coke was Recorder of London in 1591-1592, for six months before he became Solicitor-General, and therefore before this case was heard. A suggestion that I should ask the present Recorder of London to certify the present custom was not cordially received by the parties. Lord Coke's report, however, requires the sale to be "openly . . . . so that any one that stood or

(1) 5 Rep. 83b.

passed by the shop might see it." "If the sale be . . . . so that one that stood or passed by the shop could not see it, it would not change the property." Nor would it do so if the sale be in the warehouse, "for . . . . none would search there for his goods." Popham's report states the custom alleged as "That every one of their shops in London are good markets overt," and reports a decision that the custom was too wide; (1.) for the shop must be proper for the sale of the article sold, being a place that men will go to to seek for such a thing lost or stolen, and (2.) because a private sale in a proper shop will not do, for that the passers-by cannot in reason see it in their passage, distinguishing this from a sale openly in the shop so that every one passing by might see. Anderson's report states the custom in the city of London—that each place (lieu) in the city of London is an "aperte and open market" to buy and sell things; and decides that a scrivener's shop is not "open lieu de market" for plate any more than a place at the back of the shop not open to the street, or a shop where the windows are "close or shut up." Lastly Moore's report states the custom pleaded—that London is an ancient city and that "chescun shop est un market overt." The Court added the restriction for things usually sold in such shop, and excluded sales behind curtains or with shut windows. I think this custom so reported is confined to open sales in shops of goods usually sold there, and in the time of Elizabeth importance was attached not only to the sale being in an open part of the shop, but to the sale being visible to passers-by in the street. On the same lines the learned judgment of Wills J. in *Hargreave* v. *Spink* (1) declined to give protection to a sale in a first floor room over a goldsmith's shop which the public were only permitted to enter under escort and by invitation of the shopkeeper, and limited the custom to shops in which goods are openly sold, that is, with an invitation to the public to enter the shop. I refer to the authorities collected on p. 27 [1892] 1 Q. B. and following pages of the judgment. Wills J. does not refer to the possibility of passers-by seeing the sale as did the judges in the Bishop of Worcester's case.

(1) [1892] 1 Q. B. 25.

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In *Lyons* v. *De Pass* (1) the place of sale was the warehouse of a wholesale shoe manufacturer. The only evidence about it was that it was described as an "open shop" and "an open warehouse with slippers in the window." Lord Denman stated the custom to be that an open shop in the city of London was market overt for things sold in the way of the trade there carried on, and said, "I left the matter to the jury, and they thought that this was an open shop." The Court generally appeared to think that if there was an open, as opposed to a secret, sale, it made very little difference how open the shop was; that is, whether passers-by would see or not. In this they seem to me to be stating a slightly different custom from the judges in the time of Elizabeth, who undoubtedly attached importance to the sale being open or visible to the passers-by. It is to be noted that neither in this case (*Lyons* v. *De Pass* (1)) nor in the case before me was any evidence called as to what the custom now is. In the case of negotiable instruments evidence has been given from time to time to add by mercantile custom to the class of instruments now made negotiable: see *Goodwin* v. *Robarts.* (2) For instance in *Bechuanaland Exploration Co.* v. *London Trading Bank* (3) Kennedy J. on evidence held that bearer debentures had become negotiable by the custom of merchants; and in *Edelstein* v. *Schuler & Co.* (4) Bigham J. treated the custom so to regard them as one of which he must take judicial notice without evidence. If I am to take notice of the custom of the City without evidence, I do not think I am at liberty to speculate in what way modern developments are likely to have modified the old custom; and with great respect I rather think the judges in *Lyons* v. *De Pass* (1) did enter on this speculation.

I have now to consider whether on the evidence Johnson & Dymond's City Auction Rooms as described are an open shop in the city of London where goods like jewellery are usually sold. And first are they a shop at all? In *Wilkinson* v. *King* (5) Ellil's Wharf, which, though in Southwark, was apparently treated as in the city of London, being a place where

(1) 11 A. & E. 326.
(2) (1875) L. R. 10 Ex. 337.
(3) [1898] 2 Q. B. 658.
(4) [1902] 2 K. B. 144.
(5) (1809) 2 Camp. 335.

Ellil was accustomed to sell lead, was not treated as market overt for the sale of lead. In *Lyons* v. *De Pass* (1) a wholesale warehouse described by one witness as an "open shop" was found by the jury to be an open shop. I myself should not, and I do not think any person using the English language in the ordinary way would, unless tempted by the language of the custom, describe the City Auction Rooms as a "shop." Some light is perhaps thrown on the matter by the cases decided under the Markets and Fairs Clauses Act, 1847, which prohibits sales outside the market, other than in a man's own dwelling place or shop. In *Fearon* v. *Mitchell* (2) a large brick building belonging to the respondent, in which he regularly sold cattle by auction, was held not to be his "shop." Cockburn C.J. said (3): "I own my individual opinion is rather strong against an auctioneer's premises being a 'shop' at all within the meaning of the section." Blackburn J. said (4): "Prima facie a sale by auction is not generally what you would have in your mind when speaking of selling in a shop." Mellor J. appears to think that an auctioneer selling periodically may be selling in his own shop. Lush J. contrasts public auction sales with sales over the counter. See also *McHole* v. *Davies*. (5) On the other hand, in *Wiltshire* v. *Willett* (6) a building described by a witness as a dwelling-house with shop under it, on its being proved that sales by auction took place in the shop, was held under a local Act to be a shop attached to a dwelling-house. The magistrates found it was a "shop"; the Court of Common Pleas did not disturb the finding, and Byles J. said (7): "One of the witnesses calls the place in question here a shop, and in the absence of evidence to the contrary, I cannot say it was not a shop." I do not desire to say that no room or building in which auction sales are held can be a shop. In my view, it is a question of fact in each case; and in this case, on the evidence given before me at the trial, I find that the City Auction Rooms are not "a shop." In coming to this conclusion I have followed the view of Wills J.

(1) 11 A. & E. 326.
(2) (1872) L. R. 7 Q. B. 690.
(3) Ibid. at p. 695.
(4) Ibid. at p 697.
(5) (1875) 1 Q. B. D. 59.
(6) 11 C. B. (N.S.) 240.
(7) Ibid. at p. 245.

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in *Hargreave* v. *Spink* (1) that the custom of London relied upon is in derogation of the common law, and therefore those who rely upon it have to make it out. A custom which takes away one man's property and gives it to another must, in my view, be carefully watched, especially when it is not a universal custom, but limited to certain favoured localities. I appreciate that the rule of the law merchant was introduced into the common law; as Coke says, "The common law did hold it for a point of great policie, and behovefull for the Commonwealth, that faires and markets overt should be replenished, and well furnished with all manner of commodities vendible in faires and markets for the necessary sustentation and use of the people": 2 Inst. 713; and Blackstone (vol. 2, p. 450) speaks of "that other necessary policy that purchasers, bona fide, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller." But I do not think this justification of the rule requires or entitles the judges without evidence to extend a stated custom to analogous or similar cases. In *Hartop* v. *Hoare* (2), where it was attempted to extend the custom of the city of London to pawning, the Court says, "It is a rule that all customs must be taken strictly, and not extended to similar cases." I notice that in that case the Court declined judicially to take notice of the custom of London because it was not found; but as in recent reported cases the Court has taken judicial notice of the custom, I have not availed myself of this easy way out of the difficulty. I see no public reason, however, why I should struggle to find these auction rooms within the custom. They are largely devoted to the prompt sale of unredeemed pledges, and after a very limited period of public exhibition and very slight description in advertisements and catalogues, and I see no public advantage in the prompt destruction of claims by the real owner to a class of goods that are often dishonestly pawned. I therefore find as a fact that the City Auction Rooms are not a "shop" within the custom of the city of London. I may add that while I have come to this conclusion on the sworn evidence in Court without more, I went to and saw the premises the day after that evidence,

(1) [1892] 1 Q. B. 25. (2) (1742) 2 Str. 1187.

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and while I have come to that conclusion independently of that inspection, I should have come to the same conclusion on that inspection. The above finding renders it unnecessary to find whether, if a shop, the rooms were an "open shop," but as the case may go higher I shortly state my view. The original ground of the rule was that the market was overt, and the sale could be seen by people attending the market, including those looking for goods stolen from them. The word "shop" appears to be derived from the old high German "schopf," or "scopf," which meant a building without a front wall, such as a barn or vestibule. The judges in the time of Elizabeth seem to me to have attached considerable importance to the question whether passers-by could see the sale taking place; and I do not think they would have found this sale to be "open." But there is in this case public notice by advertisements to the world and by notice on placards to the passers-by that sales of certain classes of goods are taking place within in rooms to which the public are admitted. And if I had been able to find these auction rooms to be a "shop" at all, I think I should have found the "shop" to be an "open shop." But unless the whole transaction takes place in a shop mere publicity will not do. A sale by sample will not do, though completed by delivery of the goods in a shop: *Crane* v. *London Dock Co.* (1); and in my opinion a sale in the street outside these rooms, however public, would not come within the custom.

There remains the technical point taken by Mr. Atkin that as the demand and the refusal were after the issue of the writ the action failed. This point has no merits at all. If, as stated by Bramwell B. in *Burroughes* v. *Bayne* (2), the defendant had said "I hear of your claim for the first time; I cannot deliver up goods entrusted to me by another without investigation; give me a reasonable time to investigate; I have now had it and I am ready to give you the watch," I could have understood the point. But after investigation he now says "I refused and I was right; it is not your watch." The only result, therefore, of determining this point in the defendant's favour would be another writ and more costs. But though the point is technical and has no merits, it must be decided according to law; and according to law I am

(1) (1864) 5 B. & S. 313. (2) (1860) 5 H. & N. 296, at pp. 308, 309.

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glad to be able to decide it against the defendant. Demand and refusal is evidence of a conversion: *Burroughes* v. *Bayne* (1); but it may be evidence of a previous conversion: *Wilton* v. *Girdlestone*. (2) In that case the bill was by consent taken as filed on November 28, but the only demand and refusal proved was on November 29, while it was proved that the defendant held the deeds before November 28, and the Court refused to nonsuit on the ground that demand and refusal after the date of the bill was evidence for the jury of a prior conversion before the date of the bill, the deeds being in the defendant's hands before that date. In this case I have more than this, for before the writ the defendant in his letter of May 16, knowing the watch had been stolen from the plaintiff, puts forward a claim of a person other than the plaintiff, which is always evidence of a conversion. His whole course of action after writ supports this view, and I notice that in *Lee* v. *Bayes* (3), to the whole of which case I refer for a discussion of the law on this question, Willes J. admits a letter after writ refusing to give up goods as explaining the transactions before the writ. The cases of *Spackman* v. *Foster* (4) and *Miller* v. *Dell* (5), cited by Mr. Atkin, contain nothing inconsistent with this view, but are illustrations of the class of case referred to by Bramwell B. in *Burroughes* v. *Bayne*. (1) As the defendant has failed to bring this sale within the custom of the city of London, I give judgment against him for the return of the watch or its value. As he sold the watch to the plaintiff for 100*l*., and as it does not appear to have deteriorated since the sale, I fix the value at 100*l*. The judgment will be with costs.

*Judgment for plaintiff.*

J. F. C.

The defendant appealed.

May 3, 4. *C. L. Attenborough* (*Atkin, K.C.*, with him), for the defendant.

*E. W. Hansell*, for the plaintiff.

In the course of the argument the Court intimated that it

(1) 5 H. & N. 296, at pp. 308, 309.
(2) 5 B. & A. 847.
(3) 18 C. B. 599.
(4) 11 Q. B. D. 99.
(5) [1891] 1 Q. B. 468.

was unnecessary to give any decision upon the question of market overt and that they required no further argument upon that point. The arguments upon the question whether the plaintiff had a good cause of action were the same as in the Court below, and it is unnecessary to repeat them here. Upon the latter question the following authorities were cited :—Buller's Nisi Prius (7th ed.), tit. Trover, 44, 45; *Morris* v. *Pugh* (1); *Wilton* v. *Girdlestone* (2); *Wilson* v. *Anderton* (3); *Clements* v. *Flight* (4); *Lee* v. *Bayes* (5); *Burroughes* v. *Bayne* (6); *Spackman* v. *Foster* (7); *Miller* v. *Dell* (8); *Whitehorn Brothers* v. *Davison*. (9)

May 24. FLETCHER MOULTON L.J. This is an action of detinue brought in respect of the alleged illegal detention of a watch manufactured by the well-known watchmaker Breguet. At the trial two points were relied upon on behalf of the defendant: (1.) that in any case there was no cause of action at the date of the issue of the writ, and that the present action must therefore fail, without prejudice to the plaintiff's right to bring a fresh action founded on events which have taken place since that date; and (2.) that the plaintiff was not the owner of the watch because, although he had at one time been its owner, it had subsequently been acquired by a predecessor in title of the bailor to the defendant by purchase in market overt; that, therefore, the plaintiff's title was barred, and the defendant held the watch for the bailor who deposited it with him.

The second point raises very difficult questions as to the extent of the custom by which a shop in the city of London is deemed in law to be market overt. This is almost the only instance of a city strong enough to assert and maintain the privilege that a shop within its boundaries is equivalent to a market overt, though more than one city has attempted to assert it. The custom, which is a unique one, does not seem to me to be very much in keeping with modern ideas, and it is not one which is likely to receive any judicial extension; still, it is one which

(1) 3 Burr. 1242.
(2) 5 B. & A. 847.
(3) (1830) 1 B. & Ad. 450.
(4) 16 M. & W. 42.
(5) 18 C. B. 599.
(6) 5 H. & N. 296.
(7) 11 Q. B. D. 99.
(8) [1891] 1 Q. B. 468.
(9) [1911] 1 K. B. 463.

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is well established by legal decisions, and we are bound to respect it. Its limits are very difficult of ascertainment. I feel considerable doubts whether in the present case there was a sale in market overt, and Scrutton J. decided that there was not; I have, however, no strong opinion on that point, and, as we are able to decide the case on the other point, I neither affirm nor dissent from the view of that learned judge, as expressed in his most careful judgment, on the question of market overt.

I come, therefore, at once to the other point; was there a cause of action in detinue at the date of the writ? The question as to the exact moment at which a cause of action arises may seem a very technical one, but in my opinion it is a point of substance in this case, and for the following reason. In an action of detinue, as in other actions of tort, the Statute of Limitations runs from the time when the cause of action arose; consequently, if nothing has happened to give rise to an action of detinue, there is no period of time which can operate to extinguish the title of the real owner. He may have been deprived of control over his chattel for a hundred years, but it still remains his property, and an action will lie to recover it, unless there have been a demand and a refusal which would be sufficient to give rise to a cause of action. If there is a demand by the owner from the person in possession of the chattel and a refusal on the part of the latter to give it up, then in six years the remedy of the owner is barred; it is therefore very important for the owner that the law should lay down the principle that some clear act of that kind is required to constitute a cause of action in detinue. It would be mulcting the real owner of his rights, if the law did not thus insist upon some definite act or deliberate withholding as being necessary preliminaries to the arising of this cause of action. If something less were sufficient, the Statute of Limitations might commence to run against the true owner without his knowledge.

The facts of this case are very peculiar, and illustrate clearly the legal essentials of a right of action in detinue. The watch was originally bought by the defendant and was sold by him to a client, Mrs. Clayton, the plaintiff's wife, in 1902; it was an old

watch of a very celebrated maker and thoroughly well known. In 1908 it was stolen from the plaintiff, to whom it had been given by his wife, and communications, which are not material for the purposes of this judgment, passed between the plaintiff and defendant. In 1910 Bennett, another customer of the defendant, sent him a watch which he had bought as a Breguet watch in order that he might give an opinion as to its genuineness; this watch the defendant recognized as the watch which he had sold to the plaintiff's wife and which he had afterwards heard had been stolen. The defendant thereupon most properly communicated with Bennett to the effect that he recognized the watch. [His Lordship read the letter of May 11.] There is nothing more in that letter than the defendant was bound to write to the customer who had entrusted him with the watch; there is no evidence in that letter of any intention on the part of the defendant to detain it from the real owner. Much comment has been made upon the expression that the watch was stolen "a good many years ago." In my opinion it is only the language of a practical man in the defendant's position unacquainted with the niceties of English and foreign law. He might have thought it very probable that the plaintiff had no legal claim to the watch, for the law of foreign countries applicable to such a state of facts is often different from that of this country. Be that as it may, I do not think that the language of the letter indicates any intention on the part of the defendant to interfere with the legal rights of anybody. After receiving Bennett's answer that he would give up the watch on receiving the sum he had paid for it, the defendant offered to give up the watch to the plaintiff on receiving that sum from him. In all these facts I cannot see any concluded intention on the part of the defendant to detain the watch if it belonged to the plaintiff; the defendant's language is just the practical language of a person who assumes that things will be settled between the rival claimants in a fair and reasonable manner. The defendant's letter of May 16 to Mrs. Clayton is very important. [His Lordship read the letter.] By far the greater part of it consists of information as to the watch, and the only part which goes further than the giving of information is the concluding sentence,

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"Will you kindly let us know what your wishes are in reference to it?" An answer to that letter should certainly have been given. The plaintiff might have replied insisting on the restoration of the watch, or agreeing to a compromise, or saying that the defendant need take no steps at all. But no reply was sent to the defendant's letter, and I am of opinion that in declining to answer it the plaintiff's conduct was most unreasonable. In my opinion that letter cannot be construed as indicating the assertion by the defendant of any hostile title or as any evidence whatever of an intention to detain the watch wrongfully; beyond the conveyance of information the letter was a mere request to be informed of the plaintiff's wishes in the matter.

The next event in the history of the case is the issue of the writ, and the plaintiff must establish that at the moment of its issue he was in a position to bring an action of detinue; in other words, that there had been a wrongful denial by the defendant of the plaintiff's title to the watch. At first the case was treated as though the question was as to the effect of a demand by the plaintiff of his watch and a refusal by the defendant to hand it over; but this point was practically abandoned, for there had been neither demand nor refusal. Then the question was treated, but rather vaguely, as one of conversion, and the defendant's letter of May 16 was said to be evidence of conversion. But the mere fact that there was evidence pro and con on such a point would not be enough; it is necessary to find as a fact that there was a demand and refusal before the issue of the writ. If there is evidence of a demand and refusal, the tribunal may, of course, conclude that there was one in fact; but to say that this letter is to be construed as evidence of any unlawful act is to do violence to its construction and to ignore the circumstances under which it was written, and is wholly unwarranted by anything that happened up to the date of the writ. The conclusion therefore at which I have arrived is that up to that date there was nothing equivalent to a wrongful refusal or conversion on the part of the defendant, and that the action therefore cannot be maintained.

It is said that from events that happened subsequently to that date a previous conversion may be proved; I am of opinion that

that view is wrong. If there be any evidence of a conversion before writ, it is possible that there may be acts and admissions afterwards which it would be proper to take into consideration when determining whether there had been in fact a conversion before writ, but if nothing had happened before the writ which is equivalent to a detention, that which happens afterwards cannot mend the flaw. In the present case nothing equivalent to conversion or wrongful refusal had happened before writ. Test it in the following way. Suppose the plaintiff had taken no step on the receipt of the letter of May 16; could it have been said after the lapse of six years that his title to the watch was barred because he had received a letter which was equivalent in law to a detention or conversion of the watch? He would naturally answer that there had been no conversion, because no demand for the watch had been made by him, and that therefore the statute had not begun to run.

What in fact happened was that early in the morning the writ in the action was issued to the managing clerk of the plaintiff's solicitors, who went with it in his pocket to the defendant's premises; he asked to see the watch, which was shewn to him; he demanded that it should be there and then given up to him; he shewed no evidence of authority to make such demand, and the defendant refused to give up the watch; thereupon the managing clerk at once served him with the writ. It is said that the defendant's subsequent conduct in declining to return the watch and in defending the action may be regarded as relating back and as shewing the motives actuating him before the date of the issue of the writ. I cannot agree with this suggestion. The cause of the defendant's subsequent conduct was his natural irritation at being treated in an unreasonable manner; the fact that his declining to give up the watch on the demand of a stranger who produced no written authority was answered by the immediate service of a writ already issued would account for any amount of irritation. The authorities shew clearly, as one would expect, that a man does not act unlawfully in refusing to deliver up property immediately upon demand made. He is entitled to take adequate time to inquire into the rights of the claimant. The proper course for the plaintiff to have taken would have

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been to state his wishes to the defendant, who would probably have replied that he would communicate them to Bennett and ascertain before parting with the watch which of them was entitled to it. The plaintiff contends that at that date there could be no doubt as to the person to whom the watch belonged, but I think that the question as to title was one which might most properly be a subject for inquiry; the moment had not then arrived for the defendant's final decision. As there was no indication on the defendant's part of a wrongful intention to withhold the watch from its owner, I am of opinion that at the date of the writ the plaintiff had no cause of action, and that this appeal must therefore be allowed.

FARWELL L.J. I have come to the same conclusion. I express no opinion upon the question of market overt, both because it is unnecessary to do so, and because, as Scrutton J. says, the question is one of fact, and I decline to interfere with his conclusion upon it. The other question is one of considerable interest, and, upon the authorities which have been cited to us, I think that certain propositions are indisputable. Whether an action is one of detinue or of trover, proof that the detention is wrongful and amounts to a conversion forms the gist of the action; there must be an element of wrong; the mere fact of possession of the article is not enough to support the action. A very apposite definition of "conversion" is given by Bramwell B. in *Burroughes* v. *Bayne* (1): "The result is you must in all cases look to see, not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use." And a further proposition is stated in plain language by Lord Mansfield in *Morris* v. *Pugh* (2), that refusal to deliver up property upon demand to the true owner is not in itself a conversion, but is evidence of it.

The real question in the present case is whether the true inference from the conduct of the defendant subsequent to May 16 is sufficient to shew a withholding by the defendant such as to amount to a converting of the watch to his own

(1) 5 H. & N. 296, at p. 309. (2) 3 Burr. 1242.

use. As to the letter itself, I am quite unable to adopt the construction which was placed upon it by Scrutton J.; the letter seems to me to be an eminently proper and reasonable one. The watch was sold by the defendant to the plaintiff's wife, who, after it had been subsequently stolen, called and told the defendant of the theft. Some time afterwards the defendant received the same watch from another customer, and wrote to the plaintiff stating his belief that it had been stolen and asking his views upon the matter. How can such a letter possibly be construed as a claim to retain the watch in derogation of the title of the plaintiff? But it is said that the defendant refused to hand over the watch and subsequently defended this action to recover it. The man sent to demand the watch was a solicitor's clerk, a stranger to the defendant, who produced no written authority to receive it. I cannot conceive any one in the position of the defendant being so foolish as to hand over a watch to a man whom he had never seen before and who presented no credentials in writing. The writ in this action was admittedly issued before the demand for the watch was made. In my opinion it was the duty of the defendant under the circumstances to refuse to hand the watch over. What answer could the defendant have had if he had handed over the watch to the solicitor's clerk and it had been stolen from the latter on his way home? This contention of the plaintiff seems to me unreasonable. Then reliance is placed upon the subsequent letter and upon the defence of the present action. The letters, in my opinion, amount to nothing; there may be cases in which subsequent letters may throw light on the antecedent intention, but that is not so here. They shew merely that the action was defended by the defendant under his natural exasperation at the issue of the writ before his letter had been answered; in other words, the letters are the outcome of subsequent irritation, not of antecedent intention. The case is in my opinion a plain one, and the appeal should be allowed.

VAUGHAN WILLIAMS L.J. I regret that I am obliged to come to a different conclusion. The action is for the wrongful detention of the plaintiff's watch, and the defence alleges that the watch

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is not the plaintiff's, and alternatively that if the plaintiff was ever possessed of the watch he lost it, and that the watch was sold in a shop in the city of London, which shop was by the custom of that City market overt, whereby the plaintiff's property in the watch was determined. No material help, however, is to be gained by a perusal of the pleadings, which are quite simple. At the outset I may remark that the learned judge below heard the witnesses give their evidence and observed their demeanour, and we must endeavour to place ourselves in his position. It is said that the defendant's refusal on May 23 to give up the watch might be justified, because it would not be reasonable to expect him to hand it over to a stranger who might have no authority from the true owner to demand it. But there is no suggestion that the defendant did not know him, and there could have been none; for in his letter of the following day the defendant recognized him as being the clerk of the plaintiff's solicitors; and there are other matters which do not appear on the correspondence. A suggestion has been made that the defendant, being the bailee of Bennett, was entitled to have time to inquire into the matter, and I agree that he might well have the right to inquire into the antecedent history of the watch, but no such suggestion was made by him. In fact the defendant kept the watch in order to give the plaintiff an opportunity of treating Bennett handsomely. In my opinion the defendant had no right to base his refusal on any such purpose; in other words, he had no right to withhold the watch from its true owner in order to give him such an opportunity. It is plain to me that the defendant knew whose watch it was. I am not suggesting that he did anything wrong; on the contrary, I think he behaved extremely well. But we have to see whether he so withheld the watch as to render himself liable to an action. The word "conversion" is very often used, but it is not very easy to understand what it means. There is, however, no difficulty in understanding what is the sort of withholding which renders a man liable in such an action. There are many cases upon the point, but I need only refer to the judgments in *Burroughes* v. *Bayne*. (1)

(1) 5 H. & N. 296.

Martin B. says (1): "But the word 'conversion,' by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." He then refers to a note of Serjeant Williams to *Wilbraham* v. *Snow* (2) as being as good an authority on the subject as existed. Bramwell B., who differed only on the facts, said (3): "Therefore, on consideration of all the facts, had I been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff." That is the question we have to ask ourselves in the present case. In order to amount to an assertion of dominion, it is not necessary to say either "It is mine" or "It is not yours," but it is necessary to assert by word or act such a right as is inconsistent with the dominion of the plaintiff. A man may not assert any other person's title, but he may nevertheless do an act which is inconsistent with the dominion of the true owner. Very often such an act may be justified, as, for instance, if the thing is detained for the purpose of making a reasonable inquiry about the title. As to the title to this watch, there was in my opinion no room for doubt upon the facts then before the parties; the watch was the very one which had been stolen. There was not only no room for inquiry, but the defendant never pretended that he wanted to inquire; it is clear that his intention was to give the plaintiff an opportunity of compensating Bennett.

If this case had been tried before a judge with a jury instead of before a judge alone, there would have been ample evidence to justify a finding that the defendant had interfered with the dominion of the plaintiff. I have read the judgment of Scrutton J. in the Court below, and I agree with the conclusions at which he arrives. In my opinion the present appeal should be dismissed.

Upon the question of market overt, I entirely agree with the view expressed by Fletcher Moulton L.J. that we ought not to interfere with the decision of Scrutton J. Indeed, I may go

(1) 5 H. & N. 296, at p. 302. (2) (1670) 2 Wms. Saund. 47, g.
(3) 5 H. & N. at p. 311.

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further, for I should feel little difficulty in coming to the conclusion that the present case has not been brought within the custom.

*Appeal allowed.*

Solicitors for plaintiff: *Hasties.*

Solicitor for defendant: *Stanley J. Attenborough.*

W. J. B.

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K. B. D. 1911 *Jan.* 20, 21. C. A. *July* 3, 4.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

## HANAU *v.* EHRLICH.

*Contract—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4—*Agreement not to be performed within a Year—Agreement to Employ for Definite Period exceeding one Year—Provision for Determination by Notice by either Party within one Year.*

A contract of service or employment for a definite period exceeding one year, but subject to possible determination within the year upon the happening of a specified event, is within s. 4 of the Statute of Frauds, and must therefore be in writing.

*Dobson* v. *Collis* (1856) 1 H. & N. 81, approved.

*McGregor* v. *McGregor* (1888) 21 Q. B. D. 424, discussed.

APPEAL from the decision of A. T. Lawrence J. upon an award stated by an arbitrator in the form of a special case.

The facts, which were recited at length in the award, were shortly as follows. An action had been brought in the High Court by Hanau against Ehrlich, in which the plaintiff alleged that in December, 1908, it was verbally agreed at an interview between them that the plaintiff should act as, and that the defendant should procure his employment and should employ him as, the representative in South Africa of the defendant's firm and of the defendant himself respectively, upon certain terms and conditions contained in a document in the defendant's possession. The plaintiff alleged that the defendant agreed to procure the employment of the plaintiff as managing director of a certain company registered in the Transvaal, and that on or before December 4, 1908, the terms

and conditions of the plaintiff's employment as managing director had been verbally agreed between the plaintiff and the defendant and embodied in a draft agreement which, after signature by the plaintiff, was on that date sent to the company's office in Johannesburg for execution by the company. The breach alleged was in substance that the defendant had failed and refused to procure the employment of the plaintiff either by the company or by the firm, or to himself employ the plaintiff, for which breach large damages were claimed. The material allegations in the defence were a denial that any agreement was ever concluded between the plaintiff and defendant, and a plea of the 4th section of the Statute of Frauds. By consent a Master's order was made referring all matters in dispute in the action to the award of a practising barrister. At the hearing it was agreed that the arbitrator should first determine whether there was any concluded and binding agreement between the parties. At the close of the plaintiff's evidence, it was submitted (inter alia) on behalf of the defendant that the agreement alleged by the plaintiff was an agreement not to be performed within a year and therefore ought to have been in writing within s. 4 of the Statute of Frauds. Ultimately it was agreed that the arbitrator should make his final award in the form of a special case for the opinion of the King's Bench Division. The material part of the award was in the following terms: "I find that the agreement alleged and relied upon by the plaintiff was an agreement for employment of the plaintiff for a period of two years, subject to six months' notice on either side during that period, and that there was no memorandum in writing containing all the terms stated by the plaintiff in his evidence as constituting the agreement between himself and the defendant, and that the document referred to by the plaintiff in his statement of claim and in his evidence was not signed." The question for the opinion of the Court was whether upon the facts stated in the case the agreement alleged by the plaintiff was or was not within the Statute of Frauds (29 Car. 2, c. 3), s. 4.

*Atkin*, K.C., and *Colefax*, for the plaintiff.
*Dickens*, K.C., and *Bremner*, for the defendant.

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Jan. 21. The following written judgment was read by

A. T. LAWRENCE J. The question in this case is whether the agreement alleged by the plaintiff is within the 4th section of the Statute of Frauds. The arbitrator has awarded as follows: "I find that the agreement alleged and relied upon by the plaintiff was an agreement for employment of the plaintiff for a period of two years, subject to six months' notice on either side during that period, and that there was no memorandum in writing containing all the terms stated by the plaintiff in his evidence as constituting the agreement between himself and the defendant, and that the document referred to by the plaintiff in his statement of claim and in his evidence was not signed." Counsel for the plaintiff contended that this finding was to be read not as an agreement for two years with a power to determine the employment by six months' notice during that period, but as an agreement for an indefinite period within a maximum of two years. If there be anything in this subtle distinction, which I doubt, I do not so read the finding. I think that if the learned arbitrator had meant to raise any such point he would have stated it more fully and more precisely. I read the finding as meaning an ordinary agreement for employment for two years, subject to the very familiar power of determining it by a notice of specified duration. The question, therefore, is whether a power of determining a contract by notice takes a contract which otherwise would be within the statute outside of its operation. No case has been cited deciding this question in the affirmative. This is a remarkable thing if the proposition is correct, for contracts containing such a power are of frequent occurrence. The statute says "any agreement that is not to be performed" within one year of the making thereof. If the terms of the agreement denote a space of time greater than one year from the making thereof for the performance of the obligations imposed upon the parties by the agreement, it is within the statute. For in such case it is "not to be performed" within one year; whereas if its obligations can be performed within the year it cannot be said to be "any agreement 'not' to be performed" within one year. Therefore it is not a question as to what the parties probably contemplated, but it is as to what the language of the agreement requires the

parties to do in order to fulfil its obligations. It has been held that the words of the statute mean performance by both parties. Where the obligation of the one party to the agreement can be performed within the year, the case is not within the statute although the obligations of the other party cannot be performed within the year, and this seems to flow from the contrast between the word "promise" used in the first and second branches and the word "agreement" used in this branch of s. 4.

The case principally relied upon for the plaintiff was *McGregor* v. *McGregor* (1), in which it was held that an agreement by a husband for the maintenance of his wife, which was indefinite as to time, was not within the statute, the Court holding that the statute applied only to agreements which could not be performed within a year, and that it was not for the Court to speculate as to the period contemplated by the parties. That case, which is founded upon *Souch* v. *Strawbridge* (2), shews that wherever the performance may take place within the year the statute does not apply. As in this case the employment of the plaintiff was for a period of two years, it could not be performed by either party within one year. I do not think the existence of the power to give notice affects the contractual period for performance. Its exercise terminates the obligation further to perform, but the exercise of this power, though contained in the contract, is not the same thing as the performance of the contract. The words "not to be performed" in the statute apply to the obligations undertaken by each party towards the other. Giving notice is the exercise of a right; performance is the fulfilment of a duty. This view does not seem to me to be inconsistent with *McGregor* v. *McGregor* (1), and it is certainly more in accordance with the express object of the Statute of Frauds than the construction contended for by the plaintiff. Nor is it inconsistent with the cases which shew that contracts, the performance of which depends upon a contingency, are not within the statute provided the contingency may happen within a year from the making of the contract. On the other hand, *Dobson* v. *Collis* (3), *Ex parte*

(1) 21 Q. B. D. 424. (2) (1846) 2 C. B. 808.
(3) 1 H. & N. 81.

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A. T. Lawrence J.

*Acraman* (1), and *Lavalette* v. *Riches & Co.* (2) all shew that the existence of a power to determine by notice does not take the contract out of the statute if otherwise within it. If Mr. Atkin's arguments were good, no contract for personal services, however long the duration of performance stipulated for by the contract, would be within the statute, because all such contracts terminate by the death of one of the parties. Contracts the performance of which is expressed to extend over a number of years, but which contain provisions for determining the contract, seem to me to demand the evidence required by the Statute of Frauds more than any others, for the terms of such clauses are the most likely to give rise to disputes and to conflicts of evidence: see the observations of Alderson B. in *Dobson* v. *Collis*. (3) Mr. Colefax in reply relied upon *Metzner* v. *Bolton* (4), but I do not think this case has anything to do with the subject. It depended upon the old rules of pleading and whether the plaintiff could retain his verdict where at the trial his evidence shewed a variance from the contract alleged in his declaration without obtaining leave to amend the declaration. There is no question but that the power to give notice under this agreement forms part of the agreement. The question here is a different one, namely, what is the meaning of "not to be performed" in the 4th section of the Statute of Frauds. I am of opinion, therefore, that my judgment must be for the defendant upon this special case, with costs.

*Judgment for defendant.*

The plaintiff (5) appealed.

July 4. *Atkin, K.C.*, and *Colefax*, for the plaintiff. The Statute of Frauds affords no defence to this action. The agreement was one that might be performed within a year, for, although it was an agreement for employment for a possible period of two years, it was determinable by either party at any time upon giving six

(1) (1862) 31 L. J. (Ch.) 741.
(2) (1908) 24 Times L. R. 336.
(3) 1 H. & N. at p. 85.
(4) (1854) 9 Ex. 518.
(5) Note.—Although this appeal was an appeal in the arbitration, and not in the original action, the words "plaintiff" and "defendant" are employed for the sake of convenience.

months' notice; in substance it was an agreement for an indefinite period not exceeding a maximum of two years. If notice is given so as to terminate the contract within a year from its commencement, then the contract is cut down to a contract for something less than a year. The plaintiff relies upon *McGregor* v. *McGregor* (1), where it was held that an agreement by a husband to live apart from his wife and to allow her a weekly sum for maintenance was not an agreement "not to be performed within one year" within s. 4 of the Statute of Frauds, and therefore need not be in writing. In his judgment Lindley L.J. says that the effect of the decisions is that, "if the contract can by possibility be performed within the year, the statute does not apply." This is an authoritative expression of the view of the Court of Appeal, and is substantially in the same terms as the old decision of *Peter* v. *Compton* (2), where it was held that this branch of s. 4 of the Statute of Frauds applies only to an agreement which appears from its terms to be "incapable of performance within the year." It cannot be successfully contended that the present agreement comes within that language. In *McGregor* v. *McGregor* (1) the Court expressly approved of the Irish decision of *Murphy* v. *Sullivan* (3), where it was held that a contract to maintain a child for life was not within the statute.

[VAUGHAN WILLIAMS L.J. In none of the cases cited was any definite fixed term mentioned in the contract.]

It must be admitted that there is no case in the plaintiff's favour in which the contract was for a definite fixed term of more than a year, but determinable upon the happening of a contingency. In *Dobson* v. *Collis* (4) it was held by the Court of Exchequer that a contract for service for more than a year, but subject to determination within the year on a given event, was within s. 4 of the Statute of Frauds and must be in writing. That case is, no doubt, against the plaintiff, but the decision is in conflict with that of the Court of Appeal in *McGregor* v. *McGregor* (1) and must be treated as being in effect overruled.

(1) 21 Q. B. D. 424.
(2) (1694) Skin. 353; 1 Sm. L. C. (11th ed.) 316.
(3) (1866) 11 Ir. Jur. (N.S.) 111.
(4) 1 H. & N. 81.

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No doubt *Dobson* v. *Collis* (1) was treated as being good law by Turner L.J. in *Ex parte Acraman* (2), but that case was really decided upon another point, and the view taken by Turner L.J. was no more than an obiter dictum. The case of *Birch* v. *Earl of Liverpool* (3), which was relied upon by the defendant in the Court below, is also impliedly overruled by *McGregor* v. *McGregor*. (4) The period of performance of the contract is the important matter to be looked at, and it cannot be contended that the present contract is one that is incapable of performance by either party within a year. [They also cited *Donellan* v. *Read* (5); *Fenton* v. *Emblers* (6); *Wells* v. *Horton* (7); *Souch* v. *Strawbridge* (8); *Knowlman* v. *Bluett* (9); *Davey* v. *Shannon* (10); *Ridley* v. *Ridley* (11); *Lavalette* v. *Riches*. (12)]

*Dickens, K.C.*, and *Bremner*, for the defendant. The question is concluded by the authority of a continuous chain of decisions extending for upwards of a hundred years. In *Roberts* v. *Tucker* (13) Alderson B. held in plain terms: "The case of a defeasible contract, where the contract may be defeated or put an end to within the year, is not, for that reason, taken out of the operation of the Statute of Frauds; and for this the case of *Birch* v. *Earl of Liverpool* (3) is an authority." That is precisely the question in the present case. *Rex* v. *Herstmonceaux* (14), although not a decision upon the Statute of Frauds, is an analogous case and involves the same principle. There a house was hired at twenty guineas a year, the rent to be paid weekly, and either landlord or tenant to be at liberty to determine the tenancy at three months' notice from any quarter day; and this was held to be a renting of the tenement for one whole year. The decided cases establish three propositions: (1.) that if the agreement is for an indefinite period it is not within the Statute of Frauds; this is well illustrated by *Souch* v. *Strawbridge* (8); (2.) that if the agreement is for a definite

(1) 1 H. & N. 81.
(2) 31 L. J. (Ch.) 741.
(3) (1829) 9 B. & C. 392.
(4) 21 Q. B. D. 424.
(5) (1832) 3 B. & Ad. 899.
(6) (1762) 3 Burr. 1278.
(7) (1826) 4 Bing. 40.
(8) 2 C. B. 808.
(9) (1873) L. R. 9 Ex. 1.
(10) (1879) 4 Ex. D. 81.
(11) (1865) 34 L. J. (Ch.) 462.
(12) 24 Times L. R. 336.
(13) (1849) 3 Ex. 632.
(14) (1827) 7 B. & C. 551.

period of more than a year it is within the statute; and (3) that an agreement is none the less one for a definite period because it contains a defeasance clause which makes it possible that it may be determined within a year. If the plaintiff's contention is right, it follows that no contract of personal service could ever come within the statute, because, however definite may be the period of employment stipulated for, such a contract is always liable to be determined by notice within a year. But *Britain* v. *Rossiter* (1) is a clear authority of the Court of Appeal that a contract of personal service does come within the Statute of Frauds. The decision in *Dobson* v. *Collis* (2) is indistinguishable from the present case, and is absolutely in point; it was adopted by the Irish Court in *Murphy* v. *Sullivan* (3), and the latter case was in turn adopted by the Court of Appeal in *McGregor* v. *McGregor* (4); *Dobson* v. *Collis* (2) must therefore now be regarded as having all the authority of a decision of this Court. The true view of *McGregor* v. *McGregor* (4) is that it was a case in which the contract was for an indefinite time, and that that was the ground upon which the decision proceeded; the Court never intended to suggest that a contract for a definite, but defeasible, period was not within the Statute of Frauds. [They also cited *Farrington* v. *Donohoe*. (5)]

*Atkin, K.C.*, in reply.

VAUGHAN WILLIAMS L.J. Upon the question put for the opinion of the Court by the learned arbitrator I have come to the conclusion that there is an unbroken chain of authority by which this Court is bound. No doubt there are civilized countries in which the statutory code forbids any judge of any Court to act upon any previous decision as being binding on him; every judge must, by the very language of the code, express his own opinion upon the question for decision. That may be convenient, but it is not the law of this country; we have adopted a rule rather similar to the rule with regard to litigants, and we think that, when a question has been

(1) (1883) 11 Q. B. D. 123.
(2) 1 H. & N. 81.
(3) 11 Ir. Jur. (N.S.) 111.
(4) 21 Q. B. D. 424.
(5) (1866) Ir. Rep. 1 C. L. 675.

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settled by a Court of equal authority, we ought to be bound by their decision.

In his argument, Mr. Atkin frankly admitted not only that there was no authority in his favour upon the question which we have to decide, but also that there were authorities which were against his contention. I do not propose to rest my judgment upon the decision of this Court in *Lavalette* v. *Riches*. (1) I prefer to base my judgment on other cases, and to go back to what I may call the penultimate case of authority. But though I do not base my decision on any of the observations made in *Lavalette* v. *Riches* (1), I think I am justified in calling attention to the fact that the distinction between a contract for a definite time and a contract for an indefinite time was the very basis of that decision. Any one who wishes to trace the history of the decisions can do so most conveniently by referring to the judgment of the late Mr. Justice Walton in *Lavalette* v. *Riches* (2), and it will there be seen how that learned judge dealt with the case of *McGregor* v. *McGregor*. (3) But, without referring to all the cases cited in argument, I may mention *Ex parte Acraman*. (4) In his judgment in that case Turner L.J., speaking of the agreement, says: "This agreement, whether operating by way of substitution or new agreement, was in substance and effect a new agreement on the part of the Pentreguinea Fuel Company. At the time when it was entered into, the three years mentioned in the original contract had begun to run, but more than a year of that time remained unexpired. It was therefore an agreement which could not be performed within a year, and on which the Pentreguinea Fuel Company could not be charged consistently with the provisions of the 4th section of the Statute of Frauds. It was an agreement to take effect from month to month, and not an agreement founded on an executed consideration, so as to give rise to the doubts suggested by Tindal C.J. in *Souch* v. *Strawbridge* (5), which was cited by the respondents; and the attempt to take the case out of the statute on the grounds of the contract being determinable at six months' notice is met and disposed

(1) 24 Times L. R. 336.
(2) 24 Times L. R. 2.
(3) 21 Q. B. D. 424.
(4) 31 L. J. (Ch.) 741.
(5) 2 C. B 808.

of by the case of *Dobson* v. *Collis*." (1) Turner L.J. therefore bases his decision on *Dobson* v. *Collis* (1) and, in a case in which it was material to decide the matter, holds that where you have a contract for a definite time exceeding one year which would fall, if there were nothing else, within the 4th section of the Statute of Frauds, it is not taken out of the statute by the fact that the contract or bargain entered into includes a term that the contract shall be determinable by a six months' notice. That is the very question which we have to decide here, and it is unnecessary to discuss the decision at length, especially as Mr. Atkin practically admitted that if he could not get rid of the case of *Dobson* v. *Collis* (1) there was an end of his own case. But, before *Dobson* v. *Collis* (1), the question had been raised and decided in *Birch* v. *Earl of Liverpool*. (2) It is true that in that case Lord Tenterden C.J. does not deal with this matter in express terms, though he does so by necessary implication. But Bayley J. distinctly deals with it and says (3): "Assuming that the custom proved is to be considered as part of the contract, still the contract was in its terms an agreement for five years, determinable by the parties within that period. It was in the very terms of it an agreement not to be performed within a year." Under those circumstances it would be a waste of time for me to go through all the authorities. We have an admission by counsel that there is no case which decides that, where the contract is for a definite period, it is taken out of s. 4 of the Statute of Frauds because it contains a provision that the contract shall be determinable by giving a specified notice. In my judgment such a contract is a living contract for a fixed term; it is a contract which may be, and in the present case was, acted upon for a considerable period; the clause, not very happily styled a defeasance clause, does not annul the contract in the sense in which the word "annul" is used in the statutes relating to bankruptcy; the contract is not thereby made as though it had never existed, which is the case with a bankruptcy that has been annulled; it is rather like the case in bankruptcy where the order in bankruptcy is superseded, which does not affect the existence

(1) 1 H. & N. 81. (2) 9 B. & C. 392.
(3) 9 B. & C. at p. 395.

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of the bankruptcy during the antecedent period. In every tract of this kind the contract is acted upon in accordance its terms until notice to determine it is given.

I need say but a few words as to *McGregor* v. *McGrego* I agree with Mr. Dickens that the contention that Lord E. M.R., Lindley L.J., and Bowen L.J. meant to overrule stream of continuous authority is not arguable. From the cited to them it is obvious that the authorities must have brought before them in substance one after the other, not per by direct citation of every case, but at any rate by referen their citation in the arguments in the Irish cases that brought to the notice of the Court of Appeal. Having com the conclusion that there was no intention to overrule *Dobs Collis* (2), *Ex parte Acraman* (3), and the other authoriti decide the present case upon the ground that there is a seri decisions which prevent us from reopening the question. a good thing that there should be a final decision on the poin think that the judgment and the reasons of A. T. Lawrenc were right, and that this appeal must be dismissed.

FLETCHER MOULTON L.J. When the Legislature passe statute, it is the duty of the Courts to interpret that statut to enforce it. But in the case of statutes which were passed ago there may gradually accumulate a succession of decisio to their interpretation which may, and sometimes do, so bind Courts that they cannot treat the question as res integra must accept the construction already judicially determ whether they approve of it or not. There is no better exa than this very provision of s. 4 of the Statute of Frauds v requires a written memorandum of contracts which are n be performed within a year. In my opinion little is left o statute. The Courts are bound by decisions which they well think to be out of harmony both with the spirit an letter of the enactment. For instance, in very early deci the Courts, influenced by the fear that the statute would o wise work injustice, decided that a contract was to be perfo

(1) 21 Q. B. D. 424. (2) 1 H. & N. 81.
(3) 31 L. J. (Ch.) 741.

a year if one of the contracting parties could perform his ithin a year. The result is that a contract which obviously be completely performed within twenty years must be d as a contract to be performed within a year, if on one t can be so performed.

further question as to the meaning of a contract which to be performed within a year arose soon after the g of the statute. There are two possible lines of interion: the one that in order to be outside the statute a t must be such that it necessarily must be performed a year; the other, that it was sufficient if it might was capable of being, performed within that time. The have held that the latter view is the correct one. *Gregor* v. *McGregor* (1) the Court of Appeal gave what my judgment an authoritative interpretation of this ion of the statute. In that case Lindley and Bowen L.JJ. rd Esher M.R. does not differ from them) laid down their interpretation of the provision. A husband had greed to allow his wife a weekly sum for maintenance; sly the idea was that it would continue for her life. The ad to consider whether a contract running with the life wife was one which might be wholly performed within a nd Lindley L.J. said "The effect of these decisions is the contract can by possibility be performed within the the statute does not apply"; while Bowen L.J., after that he approved of the decision in *Peter* v. *Compton* (2), ds thus: "It was held that 'an agreement that is not to formed within the space of one year from the making ' means in the Statute of Frauds an agreement which from its terms to be incapable of performance within r." The seal of the Court of Appeal was thereby finally the interpretation that, if a contract might under any circumstances be performed within the year, it was not the Statute of Frauds. We are bound by this decision, h it takes all contracts of personal service out of the Act, r be the term of service and even though the considera- such that it cannot be performed within the year.

(1) 21 Q. B. D. 424. (2) Skin. 353.

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Turning to the agreement in the present case, I find it to be an agreement for two years, subject to a six months' notice on either side which may be given at any time, and I ask myself whether it is incapable of performance within the year, or whether, in the words of Lindley L.J., it can by possibility be performed within the year. If I were free to answer that question, I should say that beyond all question it might possibly be performed within the year. The period of two years has no higher contractual sanction than the effect of the six months' notice, and such six months' notice may be given at any time. It is impossible to predicate that the period of the performance of this contract is more than a year. Moreover, supposing the notice to be given, then six months after that date the contract is wholly performed. There is no ghostly survival of the contract for the remainder of the two years; the contract is wholly performed when the notice has expired. I have, therefore, no hesitation in saying that, if I were free to use my own intellect and must be guided by the authoritative utterance of the Court of Appeal in *McGregor* v. *McGregor* (1), I should certainly allow this appeal; but I am obliged to remember that, side by side with the decisions which have led up to *McGregor* v. *McGregor* (1), there has been a parallel series of decisions which have dealt with one special class of contract, one where a fixed period longer than a year has been named in the contract not as a fixed period of the contract, but only as the period during which the contract lasts in one alternative. The only cases dealing with this point to which I need refer are *Dobson* v. *Collis* (2), *Ex parte Acraman* (3), and *Lavalette* v. *Riches*. (4) In those decisions it is laid down that where a contract specifies a fixed time for its performance which is longer than a year, and contains what is called a defeasance stipulation which might terminate the contract within the year, it is within the Statute of Frauds; that is to say, a contract like the present one, which is for two years, subject to a power on either side to give the six months' notice which terminates the period of the contract and limits the obligations of parties on either side, is nevertheless within the statute. I cannot reconcile those

(1) 21 Q. B. D. 424.
(2) 1 H. & N. 81.
(3) 31 L. J. (Ch.) 741.
(4) 24 Times L. R. 336.

decisions with *McGregor* v. *McGregor* (1), but I can apply both sets of decisions, for I can say that in the smaller and more specific class to which *Dobson* v. *Collis* (2) applies there are decisions which forbid me to apply the general test laid down in *McGregor* v. *McGregor*. (1) I must obey both sets of decisions as far as I can, and when I find a general rule laid down in the one which is contrary to the specific rule laid down for the specific class in the other, I am obliged to regard such decisions as that in *Lavalette* v. *Riches* (3) as establishing an exception to the general rule laid down in *McGregor* v. *McGregor* (1), which exception, although not noticed in the last-named case, must have been intended to be included, because there are co-ordinate decisions which lay it down distinctly. I come to this conclusion with regret. I cannot see why the fact that you mention a maximum term to a contract, which only runs for that term if certain contractual powers are not exercised by the parties, should be held to override the contract to such an extent that, although it can be performed within the year, it is my duty to say that it cannot. But I am bound by the authorities, and agree that this appeal must be dismissed.

BUCKLEY L.J. The question for decision is whether a contract for a definite term exceeding a year, but determinable within a year under a power of determination contained in the contract, must be in writing in order to satisfy s. 4 of the Statute of Frauds. It may be noticed that the present contract is one which in one event will be, and in another event will not be, a contract to be performed within a year, and that that event is one contemplated by and to arise under the contract. It is now two centuries too late to ascertain the meaning of s. 4 by applying one's own mind independently to the interpretation of its language. Our task is a much more humble one; it is to see how that section has been expounded in decisions and how the decisions apply to the present case.

The question of contracts, whose term depends upon a contingency, was considered more than two hundred years ago in

(1) 21 Q. B. D. 424. (2) 1 H. & N. 81.
(3) 24 Times L. R. 336.

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*Peter* v. *Compton* (1). I only mention the case for the purpose of setting it aside as one that does not determine the present case. In that case the contingency was that of the marriage of a person; it was not a contingency to arise under the contract, by which I mean a contingency whose existence is created by the contract. The decision is thus stated in 1 Smith's Leading Cases, p. 316: "Where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenour of the agreement that it is to be performed after the year, there a note in writing is necessary: otherwise not." Following that decision, it has been held that an agreement to maintain a person during life, for a period therefore determining simply upon the contingency of human life, is not one to which s. 4 applies. But it is necessary to discriminate plainly between the two classes of cases, the one in which the agreement is for an indefinite period depending upon and determinable upon a contingency not arising under the contract, and the other in which it is for a definite period, a defined term of years, but subject to a clause contained in the contract by which the defined term of years may be cut short. The latter is a case in which the obligation may be said to be subject to a defeasance.

There are two early cases in which expressions are to be found which I think would have greatly assisted the appellant; they are *Fenton* v. *Emblers* (2) and *Wells* v. *Horton*. (3) In the former case Denison J. used these words: "The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed." According to that view, it must be expressly provided in the agreement itself that it is or is not to be performed within the year. In the second case Park J. says: "I agree with my Lord Chief Justice that, in order to bring the contract within the statute, it ought to be expressly stipulated not to be performed within a year," obviously meaning expressly stipulated by the agreement

(1) Skin. 353. (2) 3 Burr. 1278.
(3) 4 Bing. 40.

itself. But I do not think that these passages can be relied upon by the appellant, nor do I think that they correctly express the law, for in *Dobson* v. *Collis* (1) the passage from the judgment of Denison J. was read, and the Court did not accept it as a correct statement. *Dobson* v. *Collis* (1) is indeed a decision the other way.

The authorities which seem to govern the present case, so far as this Court is concerned, are three, and a fourth goes far in the same direction. In *Birch* v. *Earl of Liverpool* (2) the facts are parallel to those in *Dobson* v. *Collis* (1), in this sense, that there was a contract into which there was to be imported as a matter of legal intendment a custom that was proved, and the contract with the custom introduced into it was a contract for a defined term, namely, five years, determinable at any time within the five years in a certain event, as to which Bayley J. says: "Assuming that the custom proved is to be considered as part of the contract, still the contract was in its terms an agreement for five years, determinable by the parties within that period." Now to my mind that plainly means determinable by the parties at any time within that period, including, of course, determinable by the parties in the first year. Therefore it might not extend beyond the year. In the second case, *Dobson* v. *Collis* (3), Pollock C.B. expressly says: "It is contended that a contract for more than a year, but which may be defeated on a given event within the year, is not required to be in writing by the 4th section of the Statute of Frauds"; he goes on to discuss a contract of that kind generally, and then says: "Then does the defeasance take it out? I think that a contract is not the less a contract not to be performed within the year, because it may be put an end to within that period"; and Alderson B. says, "When once the contract exceeds the year, the circumstance that it is defeasible will not make it other than a contract for more than a year." That is an express decision upon the precise point. In the third case, *Ex parte Acraman* (4), Turner L.J. treated *Dobson* v. *Collis* (1) as good law, and by virtue of that recognition *Dobson* v. *Collis* (1) has become equivalent to a decision of this Court; we are,

(1) 1 H. & N. 81.
(2) 9 B. & C. 392.
(3) 1 H. & N. 81, at p. 84.
(4) 31 L. J. (Ch.) 741.

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therefore, bound by it. I do not stay to deal with the fourth case, *Lavalette* v. *Riches* (1); the law is in effect ascertained.

As against that chain of authority Mr. Atkin relies upon *McGregor* v. *McGregor* (2), and I wish to say what that case appears to me to decide. It was the case of an indefinite term, and not of a defined term, subject to a defeasance. Lord Esher M.R. (3) adopts as correct the statement of the law made by Tindal C.J. in *Souch* v. *Strawbridge* (4), as deduced from *Boydell* v. *Drummond*. (5) The rule was there stated thus: "Where the agreement distinctly shews, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that, where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply." In the present case I think the parties have contemplated the performance extending for a greater space of time than one year; they contemplated its extending for two years. They have contracted for two years, and none the less because by a clause contained in the agreement itself they have said: "But the service need not be rendered for the period of two years as to which we are contracting, if one of the parties gives a notice to the other to bring the matter to an end." I will refer to Lindley L.J.'s words. He had just mentioned *Murphy* v. *Sullivan* (6), which in its turn cited *Dobson* v. *Collis* (7), and therefore the proposition which I have been discussing must have been present to his mind. Lindley L.J. says: "The effect of these decisions is that, if the contract can by possibility be performed within the year the statute does not apply." If I read that as meaning "If the contract being for an indefinite time can by possibility," &c., the sentence is perfectly accurate. If I read it without the words which I have inserted, or if I insert to make it plain, other words,—"if the contract whether for an indefinite or definite time,"—then there are not decisions which bear that out. The learned Lord Justice was dealing with a case in which

(1) 24 Times L. R. 336.
(2) 21 Q. B. D. 424.
(3) 21 Ibid. at p. 429.
(4) 2 C. B. 808.
(5) (1809) 11 East, 142.
(6) 11 Ir. Jur. (N.S.) 111.
(7) 1 H. & N. 81.

the fact was that there was an indefinite time, and I think I am right in attributing to him this meaning, that he was intending to say that in a case of that sort the effect of the decisions was such as he stated; in other words, that he was not affirming anything contrary to *Dobson* v. *Collis* (1), or saying that, if the time were a definite time, the same proposition would be true. Bowen L.J., after referring to *Peter* v. *Compton* (2), says: "In *Peter* v. *Compton* (2) it was held that 'an agreement that is not to be performed within the space of one year from the making thereof' means in the Statute of Frauds an agreement which appears from its terms to be incapable of performance within the year." Returning to *Peter* v. *Compton* (2), we find that the word "incapable" is not used for the first time by Bowen L.J., but is taken from the head-note in *Peter* v. *Compton*. (2) He is following the language of that head-note, and I do not understand him to be affirming as his opinion that the case of a definite term falls within these words. I think he was addressing himself to the case before the Court, the case of an indefinite term. To my mind, therefore, *McGregor* v. *McGregor* (3) was only, as the judges expressed it to be, an investigation of what the law had theretofore been declared to be. That case laid down no new law at all, and therefore *Dobson* v. *Collis* (1) and *Ex parte Acraman* (4) correctly describe the law as ascertained by decisions of this Court, and are binding upon us. On these grounds I think that this appeal must be dismissed.

*Appeal dismissed.*

Solicitors for plaintiff: *Michael Abrahams, Sons & Co.*
Solicitors for defendant: *Spyer & Sons.*

(1) 1 H. & N. 81.
(2) Skin. 353.
(3) 21 Q. B. D. 424.
(4) 31 L. J. (Ch.) 741.

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*May* 4, 5, 26; *July* 28.

[IN THE COURT OF APPEAL.]

## GILLOW AND OTHERS *v.* THE COUNTY COUNCIL OF DURHAM AND OTHERS.

*Education—Non-provided School—Duty to maintain and keep efficient—Appointment of Caretaker—Management of School—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.

The duty of seeing that a non-provided public elementary school is kept clean and properly cared for is, by s. 7, sub-s. 1, of the Education Act, 1902, cast primarily upon the local education authority. The right to appoint the cleaners and caretakers of a non-provided school is therefore vested in the local authority, and not in the managers, whose duty in respect of seeing to the cleansing of a non-provided school under the powers of management conferred upon them by s. 7, sub-s. 7, of that Act arises only by way of supplement and assistance to the local education authority.

So *held* by Fletcher Moulton L.J. and Farwell L.J. (Vaughan Williams L.J. dissenting).

Decision of Hamilton J., [1911] 1 K. B. 222, reversed.

APPEAL of the defendants from the decision of Hamilton J. in an action tried without a jury, reported [1911] 1 K. B. 222.

The plaintiffs were the foundation managers, appointed under s. 11 of the Education Act, 1902, of a public elementary school, known as St. Patrick's Roman Catholic School, at Consett in the county of Durham. The defendants the Durham County Council were the local education authority for the county; the two other defendants were the managers of the school appointed under the Act by the Durham County Council and the Consett Urban District Council.

The school was a non-provided school within the meaning of the Education Act, 1902. From the year 1870 it had been carried on as a public elementary school, and it was recognized as such by the Board of Education; from the coming into operation of the Education Act, 1902, it had been recognized by the defendant council as a public elementary school. It was maintained and kept efficient under the Act by the defendant council. When the Act of 1902 came into operation William McGuinness was the caretaker and Margaret Kane was the cleaner employed at the school. McGuinness was also employed

as caretaker at St. Mary's Roman Catholic School, a non-provided public elementary school at Blackhill in the same county. After the Act of 1902 came into operation the employment of McGuinness and Kane was continued, and their salaries were paid by the defendant council. In November, 1904, certain provisional regulations for the guidance of district sub-committees, managers, &c., which had been made by the Durham County Education Committee were approved by the defendant council; regulation 22 provided that one of the duties of a district sub-committee was "to appoint caretakers for the schools within the district at such scale or salary as may be sanctioned by the county education committee."

In 1905 the duties of school caretakers and cleaners were set out in a document issued by the Durham County Education Committee and were indorsed upon the forms of application by candidates for the post of caretaker. These duties consisted in sweeping and scouring the rooms, lavatories, and passages in the school and the doors and approaches thereto; dusting the desks, seats, and other furniture, and removing ink stains from the desks and furniture; flushing and cleaning the water closets and urinals daily; keeping the playgrounds free from any accumulation of dirt; cleaning the eaves, gutters, rainwater pipes, &c., occasionally to prevent them from becoming choked; lighting fires in the rooms and attending to the lighting throughout the school; keeping the pictures, maps, plans, and charts free from dust, and cleaning inkstands and cupboards when required; and opening the school door before school hours.

Early in 1909 the position of cleaner at St. Mary's School at Blackhill became vacant, and the defendant council, acting by their education committee, claimed the right to appoint to the vacancy upon the ground that they had the right to appoint and dismiss caretakers and cleaners in non-provided public elementary schools in accordance with regulation 22 of the provisional regulations. In pursuance of that claim, on April 21, 1909, they gave notice to McGuinness terminating his engagement as caretaker at the Consett and Blackhill schools on May 31, and they also gave notice to Kane terminating her engagement as cleaner at the Consett school on the same date. On May 31, 1909,

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the Consett district education sub-committee appointed Kane to be caretaker and cleaner of the Consett school, and McGuinness to be caretaker and cleaner of the Blackhill school. The plaintiffs disputed the claims of the defendant council to appoint and remove caretakers and cleaners of the non-provided schools, and brought this action, claiming:

(1.) A declaration that the managers of St. Patrick's non-provided Roman Catholic public elementary school at Consett were entitled to appoint a caretaker and cleaner of that school.

(2.) A declaration that the managers were entitled to have such caretaker and cleaner maintained and paid by the defendant council.

(3.) A declaration that the regulations made by the defendant council for the appointment by them of caretakers and cleaners of the said school were ultra vires and void in law.

Hamilton J. gave judgment for the plaintiffs, holding that they had succeeded upon their first two claims, as to which he made declarations in the following form:—

(1.) That the plaintiffs are entitled to cause the school to be duly cleaned and attended to, and that the local education authority are not entitled to interfere with their management in that respect.

(2.) That the plaintiffs are entitled to have the reasonable expense of cleaning the school and duly attending to it paid by the local education authority as part of the expenditure necessary for the maintenance and efficiency of the school.

The learned judge was of opinion that no separate declaration was required on the third head and made none.

The defendants appealed.

*Tindal Atkinson, K.C.*, and *Simey*, for the defendants.

*C. A. Russell, K.C.*, and *V. S. Browne*, for the plaintiffs.

The arguments were the same as those in the Court below, of which an elaborate report appears in [1911] 1 K. B. at pp. 224—228. It is considered unnecessary to repeat them here. The following cases were cited:—*Attorney-General* v. *West Riding County Council* (1); *Ching* v. *Surrey County Council* (2); *Morris*

(1) [1907] A. C. 29. (2) [1910] 1 K. B. 736.

v. *Carnarvon County Council* (1); *Crocker* v. *Plymouth Corporation* (2); *Young* v. *Cuthbert*. (3)

*Cur. adv. vult.*

July 28. The following written judgment was read by

VAUGHAN WILLIAMS L.J. This is an appeal from the judgment of Hamilton J. without a jury. He gave judgment for the plaintiffs for two declarations asked for by them: (1.) A declaration that the managers of St. Patrick's non-provided Roman Catholic public elementary school at Consett were entitled to appoint a caretaker and cleaner of the school; (2.) a declaration that the managers were entitled to have such caretaker and cleaner maintained and paid by the defendant council. The plaintiffs further asked for a declaration that the regulations made by the defendant council for the appointment by them of caretakers and cleaners of the said school were ultra vires and void in law; the learned judge declined to make this declaration on the ground that it was unnecessary.

The plaintiffs were foundation managers, appointed under s. 11 of the Education Act, 1902, of the Roman Catholic public elementary school known as St. Patrick's Roman Catholic School at Consett in the county of Durham. The defendants the County Council of Durham were the local education authority for the county, and the two other defendants were managers of the school appointed respectively by the county council and the Consett Urban District Council. The school in question was a non-provided school within the meaning of the Education Act, 1902. Prior to 1902 and since 1870 it had been a voluntary elementary school, receiving a parliamentary grant in aid, under the Act of 1870.

In the early part of 1909 the cleaner theretofore employed at St. Mary's Roman Catholic School at Blackhill ceased to be employed, and the defendant council, acting by their education committee, claimed the right to appoint as to a vacancy, upon the ground that they had the right to appoint and dismiss caretakers and cleaners in non-provided public elementary schools,

(1) [1910] 1 K. B. 840. (2) [1906] 1 K. B. 494.
(3) [1906] 1 Ch. 451.

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in accordance with regulation 22 of the provisional regulations approved by the county education authority of the county of Durham at a meeting held on November 10, 1904. The salaries of the caretakers and cleaners in non-provided schools were paid by the defendant council, but there is no evidence that they paid such persons directly.

The case of the defendants was put somewhat in this way: It was pointed out that under ss. 15 and 16 of the Elementary Education Act, 1870 (now repealed), the school board were permitted to delegate to managers appointed by them, with or without conditions or restrictions, the control and management of a school provided by them, and that default in compliance with regulations declared by the Education Department should, whether by act or omission, be deemed to be permitted by the board unless the contrary be proved. And s. 18 of the Act of 1870 imposed the duty upon the school board of maintaining and keeping efficient every school provided by the board. It was also pointed out in the argument of counsel for the defendants that before the Education Act, 1902, voluntary schools were not subject in any way to the school board, whereas under the Act of 1902, s. 6, sub-s. 2, "All public elementary schools not provided by the local education authority shall, in place of the existing managers, have a body of managers consisting of a number of foundation managers not exceeding four, appointed as provided by this Act, together with a number of managers not exceeding two, appointed —(*a*) where the local authority are the council of a county, one by that council and one by the minor local authority; and (*b*) where the local education authority are the council of a borough or urban district, both by that authority." It was argued that although the Act of 1870 has been repealed, and although the whole of the old machinery has gone, yet the words "maintain and keep efficient," which appear as well in s. 18 of the Act of 1870 as in s. 7 of the Education Act, 1902, ought to be read in the same sense in both Acts, i.e., that although the managers are no longer appointed by the school board, or now by the education authority excepting as to two out of six, the duty and power of the education authority remain as under s. 18 of the Act of 1870. Now by s. 7, sub-s. 4, of the Act of 1902, "one of

the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant shall be that it is maintained under, and complies with, the provisions of this section." By the Code the school must be properly warmed and lighted in order to obtain the annual parliamentary grant, which is only given if the school is efficient. The inference invited by the argument was that except where the managers of a non-provided school are given express powers by the Act they are merely ministers of the local education committee to see that the scheme of education and the requirements of the statute are carried out, and the caretaker therefore is the servant of those who pay him; that where the Act intends to give the managers of a non-provided school power to appoint and dismiss, it does so in express terms: see s. 7, sub-s. 7.

This, briefly, is the argument of the appellants. There is a great deal of it with which I cannot agree, although it is plain, prima facie, that the caretaker and cleaner are the servants of those who pay them and should be appointed by them. In the first place, I will examine the provisions of s. 7, and I note that under sub-s. 1 of s. 7 the local authority have only to maintain and keep efficient a non-provided school necessary in their district, so long as certain conditions are complied with, but the words do not express the idea that the managers of a non-provided school are ministers to carry out the behests of the local education authority or that they stand in the positions respectively of principal and agent; and if the managers are not delegates, but an independent authority, it may be that the prima facie inference that those who pay have the right of appointment of the servants they pay is displaced, and I think it is by the plain intention of the Act. In *Attorney-General* v. *West Riding County Council* (1) the judgments of Lord Davey in terms, and of the other Law Lords by implication, negative the proposition that it is impossible to so construe an Act of Parliament as to sever the duty of paying the cost from that of exercising control. Lord Davey says (2): "It is, no doubt, unusual for Parliament to impose a duty on a public body to provide out of public moneys for expenditure on objects which are not under its control. On

(1) [1907] A. C. 29. (2) [1907] A. C. at p. 39.

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the other hand, I am not prepared to say that the duty to pay is necessarily commensurate with the power of control over the application of the moneys paid, or that there is any such necessary connection between payment and control as will raise an implication in the absence of any express direction to that effect."

Under sub-s. 2 of s. 6 the four foundation managers are not appointed by the local education authority, but under s. 11 are appointed under the provisions of the trust deed of the school, or if those provisions are inconsistent with the provisions of the Act or otherwise inapplicable, under a special order of the Board of Education; there is no special order in the present case. The conditions to be complied with are as follows: Sub-s. 1 (*a*) of s. 7, that the managers shall carry out any directions of the local education authority with respect to number and qualification of teachers, and for dismissal of any teacher on educational grounds, and if managers fail to carry out any such direction the local education authority shall, in addition to their other powers, have power to carry out the direction in question themselves as if they were the managers. This condition, which is of limited application, applying only to secular instruction, seems to provide that if the managers fail to carry out the directions as to teachers the local education authority may enter and carry out the direction. This is quite inconsistent with the relation of principal and agent or indeed with any relation which does not place the managers, prima facie, in the position of having independent statutory authority; whereas under the Act of 1870 the school board authority could displace the managers whenever they chose and act themselves as managers quite irrespective of any disobedience by the managers, unless it was inconsistent with terms of appointment which they had chosen to grant. Further, by sub-s. 1 (*b*) the local education authority has power to inspect, which provision seems unnecessary as between principal and agent or master and servant. By sub-s. 1 (*c*) the consent of the local education authority is required for appointment and dismissal (except on grounds connected with religious instruction) of teachers. The inference from (*c*) is that the consent is not required in other cases. I will deal hereafter with the inference to be drawn from sub-s. 7. Sub-ss. (*d*) and (*e*) of

sub-s. 1 of s. 7 seem of no importance except in so far as they recognize the managers of a non-provided school as having dominion over the schoolhouse, as indeed sub-s. 2 of s. 7 does. The effect of failure to obey directions with regard to teachers under s. 7, sub-s. 1 (*a*), is that the authorities may carry out the direction as if they were managers. Under sub-s. 4 of s. 7 maintenance under, and compliance with, the provisions of the section is made one of the conditions required to be fulfilled in order to obtain a parliamentary grant. Can any one doubt but that this sub-s. 4 of s. 7 of the Act of 1902 deprives the Church school of the right to be maintained and kept efficient at the public expense? Non-compliance with the conditions of the section does not put an end to the school as an elementary school. It only deprives the school managed by the six managers, four of whom are appointed under the Church school deed, of the right to be maintained at the expense of the State. The loss consequent upon non-compliance with the conditions of this section really falls on the Church represented by the body of managers constituted as aforesaid. This section in my opinion goes far (as do the words "as if they were the managers" in sub-s. 1 (*a*)) to shew that the managers of the non-provided school are not delegates or agents of the local education authority, but have independent statutory authority to manage the non-provided school subject to the supervision of the local education authority, especially in respect of expenditure.

Sub-s. 7 of s. 7 provides that the managers of a school maintained but not provided by the local education authority shall have all the powers of management required for the purpose of carrying out this Act and shall (subject to the powers of the local education authority under this section) have the exclusive power of appointing and dismissing teachers. It is suggested on behalf of the appellants that this expression of the exclusive power to appoint and dismiss teachers excludes by necessary implication the exclusive power to appoint and dismiss school cleaners. I cannot agree; the provision in s. 7 is intended merely to save in terms the powers of the managers reserved by implication in s. 7, sub-s. 1 (*a*), (*c*). It can hardly be supposed that this express reference to the exclusive powers of the managers (subject to the

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powers of the education authority under this section, i.e., the power reserved by s. 7, sub-s. 1 (*a*), to the local authority in respect of appointment and dismissal, and by sub-s. (*c*) the withholding of consent by the local education authority on educational grounds) to appoint teachers could be intended to exclude the powers of the managers to appoint school cleaners, and especially is it difficult to draw such an inference when the provisions of (*d*) and (*e*) of sub-s. 1 of s. 7 and sub-s. 2, dealing with the access and use of the school by the local education authority, are called to mind. I am far from saying that the local education authority would not have the right to refuse future payments for cleaners if the persons appointed by the managers did not clean properly. I think in this way they could compel the managers to dismiss the inefficient cleaners and appoint efficient and proper persons, and the local education authority could in case of difference between them and the managers get any question determined by the Board of Education. But the question raised in this case is not a question relating to the rights and duties of the local education authority in a case in which the caretaker or cleaners are incompetent; it is a question of the right to employ such persons as the managers think fit who have not yet entered upon their duties.

Having thus stated the arguments put forward on behalf of the plaintiffs and defendants respectively, I will now deal with the judgment of Hamilton J. The learned judge begins with a statement, in which I entirely agree, that the detailed statement as to the duties of caretakers and cleaners in the document of 1904 issued by the Education Committee of the County Council of Durham does not advance the matter further than the description of those persons as caretakers and cleaners, and the learned judge then proceeds to question the necessity for the official appointment of some one person as caretaker or cleaner and says he cannot find anything in the nature of the duties of such persons to forbid the employment of a person to do the work as and when employed. I agree with this, notwithstanding the provision for appointment of caretakers in clause 22 of the provisional regulations for the guidance of district sub-committees, managers, and others approved by the county education authority in 1904, but

I also think, for reasons which I have expressed in the earlier part of this judgment, that so far as relates to non-provided schools the local education authority has not the same duty or power towards or over the managers as the school board had, under the Act of 1870, over their managers who were appointed by them, since four out of six of the managers are appointed under the provisions of the school deed, and since for reasons already set forth the provisions of s. 7 of the Act of 1902 are quite inconsistent with the view that the managers of a non-provided school are ministers or delegates of the local education authority. I am convinced that the view that the managers of a non-provided school should directly employ and in this sense appoint such persons as caretakers and cleaners is the view which is most consistent with the provisions of the Act of 1902, taken as a whole, and it is a view which I believe has been generally adopted hitherto. It is a great pity that this matter was not referred for determination to the Board of Education. I think that this appeal should be dismissed, but my learned brethren, I understand, differ from me.

FLETCHER MOULTON L.J. I have had an opportunity of reading Farwell L.J.'s judgment, and I agree with the same.

The following written judgment was read by

FARWELL L.J. The question raised by this appeal is whether the local education authority or the managers have the power of appointing and dismissing the caretaker and cleaners of the public elementary school at Consett, and this depends on the true construction of the Education Act, 1902. That Act created local education authorities (s. 1) and gave them throughout their respective areas the powers and duties of "school board and school attendance committee" under the prior Acts—this includes the control and management under s. 14, the maintenance and keeping efficient under s. 18, and the appointment of officers under s. 35 of the Elementary Education Act, 1870—and made them responsible for, and gave them the control of, all secular instruction in non-provided public elementary schools (s. 5 of the Education Act, 1902): this latter control is given for the first time by this section, the old voluntary schools having

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been free from the control of school boards. So far, therefore, as secular instruction is concerned, the local authority is responsible for and has the control of it. The next section (s. 6) relates to the management of public elementary schools, and this is divided into two heads: the provided schools are to be managed by managers appointed by the local authority, and the scope of their duties is settled on their appointment by the local authority (Sched. I., B. (4.)); these managers are, therefore, merely delegates or agents of the authority; the non-provided schools are dealt with separately; they have four foundation managers (who are the managers appointed under the trust deed of the school (s. 11)) and two appointed managers, all of whom act together as one body (s. 11 (6.)); they have no delegated authority, but such powers and duties as they possess must be looked for in the Act; it has not been, and could not, in my opinion, have been successfully, argued that the words in s. 6, sub-s. 2, appointing the managers "in place of the existing managers" can give them all the powers that such existing managers possessed; down to this point, therefore, they are merely nominated, with no duties or powers assigned to them. Then comes s. 7, on which the question mainly depends: "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose." So far the Act has placed the responsibility for and control of the whole of the secular education in public elementary schools in the country on the local education authorities; they have to supply and maintain and keep efficient the schools and appurtenances and provide and pay for teachers, staff, materials, and everything required for the purpose: it cannot be doubted that amongst these duties, and in order to keep the schools efficient, provision must be made for cleaning and caretaking. The only question, therefore, is whether there are any subsequent provisions in the Act which restrict this generality and transfer to the managers any of these powers and duties which are clearly given to and imposed on the local authorities in the first instance.

Now the question involved in this appeal is twofold: (1.) Has the local authority the right to appoint only if they are called

upon to pay, or (2.) in any case, even if the managers pay? It is in my opinion clearly the duty of the local authority to be satisfied that the schools are kept efficient, including in that term cleaned and cared for, and to find the money for the same, and for this purpose to take all such steps as may be necessary, including the appointment of cleaner and caretaker; if the duty is performed by some one else at his own expense and the local authority is satisfied, there is no more to be said; but down to that point the duty and responsibility rest on the local authority. But s. 7 creates certain exceptions from both powers and liabilities; the first is of expenditure; the Act left the trustees and owners of schools in possession of their property, requiring only the use thereof for educational purposes, in respect of which the authority pays for fair wear and tear, and imposed on the trustees and owners the duty of keeping their schoolhouse in good repair and of making such alterations and improvements in the buildings as might be reasonably required by the authority—a reasonable provision, as the premises remain the property of the trustees or owners; but there is no other exception to the liability of the local authority for necessary expenditure; whoever therefore appoints the necessary caretaker, the local authority must pay his wages. This is not, of course, conclusive, but there is an element of fairness which must not be forgotten, in holding that the man who pays the wages ought to have the right to appoint the wage-earner.

I now come to sub-s. 7 of s. 7, and it is on this subsection alone that the managers can rely with any prospect of success. "The managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act, and shall (subject to the powers of the local education authority under this section) have the exclusive power of appointing and dismissing teachers." It is to be observed that the powers of management given to the managers are not general, but are limited to those required for the purpose of carrying out the Act; but down to this point the whole of the duties and powers have been committed to the local authority. It cannot

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be that this is intended to limit those powers and duties by setting up a rival authority; its object is to supplement them by giving the local authority the assistance of managers, leaving the former the masters of the situation, just as a great landowner appoints an agent to manage his estates. It is true that the managers are not appointed by the local authority as the agent is by the landowner, but they are appointed by the Act which has also created the local authority, and which has, in my opinion, created a relation corresponding to that of the landowner and agent or manager. Secondly, the power claimed by the managers is that of appointing an officer. Sub-s. 7 gives the exclusive power of appointing and dismissing teachers (subject to a proviso) to the managers, and this is done by a separate sentence; the words are not that they shall have all the powers of management, &c., including the power of appointing teachers, but shall have all powers of management, "and shall have the power" of appointing teachers, shewing that the Legislature regarded such appointments as distinct from and outside the management in the first part of the sub-section. Thirdly, the express power of appointing "the necessary officers, including teachers," is given to school boards by s. 35 of the Act of 1870; this power is vested in the local authority by s. 5 of the Act of 1902; s. 7, sub-s. 7 of the Act of 1902 takes away the power of appointing teachers alone; the power to appoint other officers is left untouched; and although "officer" may seem a somewhat magniloquent word to describe a caretaker or cleaner, it is certainly capable of including it and must bear that construction under the Act of 1870, for there is no other express power to appoint such persons at all. There was a further point suggested by Mr. Tindal Atkinson on behalf of his clients, with an altruistic fairness somewhat unusual in cases of this description; he urges that if the local authorities have the right to appoint and dismiss and the duty to pay the caretaker, there can be no question about the existence of the relationship of master and servant between them, and that the rates are a more proper fund out of which to pay any such damages as arose in the teacher's case a short time ago (1) than the voluntary

(1) See *Smith* v. *Martin*, ante, p. 775.

contributions or small funds of a non-provided school or the pockets of the managers. I think there is some force in the argument as being in accordance with the general scope and intent of the Act of throwing the whole of the duties and responsibility of public elementary schools on the local authority, nor do I think there is any injustice done to managers; the conditions and provisions in s. 7 are not directly mandatory enactments, but are the terms on which the voluntary schools can take the benefits given them by the Act if they choose. If they do not so choose, their school ceases to be a public elementary school within the meaning of the section, and they can do as they please, but at their own expense.

Mr. Russell urged the desirability of the caretaker's religion being the same as that taught in the school, but I think the argument of no weight at all. The Act recognizes denominational teaching as permitted in the voluntary schools, and accordingly allows the teachers to be appointed by the managers in order that they may provide for instruction in accordance with their religious opinion, but it does no more. In my opinion the duty of the persons who appoint officials (not being teachers in non-provided schools) is to choose the best candidate having due regard to character as well as to competence, but wholly irrespective of religious or political opinions. Moreover the risk of interference by a cleaner or caretaker with the children's religion appears to me to be so small as to be inappreciable.

I have, therefore, come to the conclusion that Hamilton J.'s judgment, excellently reasoned and expressed though it be, cannot be sustained. I agree with him in thinking that the managers have a duty to see that the school is kept clean and properly cared for, but I differ from him in thinking that this is a duty cast primarily on them; the primary duty is on the local authority,—the managers' duty arising by way of supplement and assistance to that authority. The Act has worked without practical difficulty in this respect for nine years. In almost all cases the local authority leaves it to the managers to make these small appointments and adopts their nominees and pays them, just as the landowner adopts the estate carpenters and the like appointed by his agent; but the ultimate decision if any question

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arises is with the local authority as it is with the landowner. The question in most cases is a small one, but it may be of importance; if, for example, a local authority in a large town desired to make a comprehensive scheme for the cleaning of all the schools in the town, or for providing materials or coals from one store at wholesale prices. In all such cases the local authority has the last word if any question arises, subject only to an appeal to the Board of Education in cases to which s. 7, sub-s. 3, applies. This appeal must be allowed and the action dismissed with costs here and below.

*Appeal allowed.*

Solicitors for plaintiffs: *Ridsdale & Son, for Watts & Carr, Liverpool.*

Solicitors for defendants: *Maude & Tunnicliffe, for R. Simey, Durham.*

W. J. B.

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[IN THE COURT OF APPEAL.]

## McCARTHY *v.* CAPITAL AND COUNTIES BANK.

*Practice—Costs—Notice to Debtor of Act of Bankruptcy committed by Creditor—Refusal to pay Debt—Action by Creditor—Payment into Court—Debtor's Right to Costs of Action.*

A creditor who had committed an available act of bankruptcy demanded payment from his debtors, but they refused to pay upon the ground that they had notice of the act of bankruptcy. The creditor sued them and they at once paid the money into Court under an order made upon their application. The plaintiff issued a summons for judgment under Order XIV., which was adjourned until the expiration of three months from the date of the act of bankruptcy. After the three months expired the plaintiff obtained leave to sign final judgment and an order that each party should pay their own costs, except that the defendants should pay the plaintiff's costs of the application to pay into Court:—

*Held* (allowing the appeal), that the defendants were entitled to their costs of the action, including the costs of the application to pay into Court.

APPEAL of the defendants from an order of Bucknill J.

The plaintiff was a customer of the defendant bank, and on

February 24, 1911, there was a sum of 298*l.* to the credit of his current account; on that day his solicitors gave notice to the bank that he had just committed an act of bankruptcy. On March 29 the plaintiff demanded payment of the sum of 298*l.*, but the bank refused to pay upon the ground that they had notice of the act of bankruptcy. Thereupon, on the same day, the plaintiff issued and served the writ in this action to recover the sum of 298*l.* The defendants entered an appearance and, on April 3, took out a summons in the action, asking for an order that they should pay into Court the amount claimed after deducting their costs of the action, and supported it by an affidavit stating that they claimed no interest in the sum of 298*l.*, but were advised that, having notice of an act of bankruptcy, they could not safely pay the plaintiff and that the proper course was to pay the money into Court so that it might be preserved until it was seen whether any proceedings in bankruptcy were taken against the plaintiff and consequently whether he or the representative of his estate would be entitled to the amount. Upon that application an order was made on April 6 giving the defendants leave to pay into Court, the question of costs being reserved; and they accordingly paid the money into Court.

The plaintiff, on April 4, took out a summons under Order xiv. for leave to sign final judgment, and on April 10 the Master adjourned it until after the expiration of three months from the date of the act of bankruptcy. On June 13 the Master made an order upon that summons as follows: "It is ordered that the plaintiff be at liberty to sign final judgment against the defendants for the amount indorsed on the writ and that the amount paid into Court . . . . be paid out to the plaintiff's solicitors without further authority. Each party to pay their own costs of action, except plaintiff's costs of the application to pay into Court to be taxed or agreed and paid by the defendants." Bucknill J. dismissed the defendants' appeal from the order as to costs and gave leave to appeal.

*McCardie*, for the defendants. Though this is an appeal upon a question of costs only, it is a question of principle. In the

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circumstances of this case the defendants were entitled to all their costs of the action. They could not safely pay the plaintiff, as they had notice of the act of bankruptcy, and when he brought this action they took the proper course, as appears from the decision of the Court of Appeal in *Ponsford, Baker & Co.* v. *Union of London and Smiths Bank.* (1) They could not have taken any other course, and all the costs have been incurred owing to the plaintiff having committed an act of bankruptcy before bringing this action. They are in the same position as if they had been able to make and had made a tender before action, in which case they would be entitled to their costs.

*Alan Macpherson*, for the plaintiff. The Master and judge had a discretion as to the costs and rightly exercised that discretion. The act of bankruptcy did not in any way impair the plaintiff's right to this debt, and he was entitled to issue the writ in this action at once. The defendants could have offered to pay the money into Court and their summons was unnecessary. The plaintiff was clearly entitled to judgment under Order XIV., subject only to the money remaining in Court until three months had elapsed since the act of bankruptcy. The decision in *Ponsford, Baker & Co.* v. *Union of London and Smiths Bank* (1) related only to the position of a secured creditor with regard to his securities when he had notice of an act of bankruptcy committed by his debtor; and Fletcher Moulton L.J. pointed out that notice of an act of bankruptcy did not in any wise lessen the obligation of a debtor to pay or act as a moratorium. Therefore the plaintiff properly took these proceedings, and the Master and judge properly exercised their discretion as to costs.

Fletcher Moulton L.J. This is an important point of practice in a case where the plaintiff is a person who has committed an act of bankruptcy, of which the defendant has notice, but nevertheless sues the defendant for an undisputed debt before three months have expired since the act of bankruptcy and therefore before it has been determined whether or not there will be an adjudication within the statutory period. In *Ponsford, Baker & Co.* v. *Union of London and Smiths Bank* (1) this

(1) [1906] 2 Ch. 444.

Court decided that it was not intended that notice of an act of bankruptcy should in any way benefit debtors of the man who had committed it. Such a notice puts the assets of the man who has committed the act of bankruptcy into such a position that he has no right to deal with them or to give a valid discharge for debts due which form part of his assets. But it is not intended that this should affect the obligation of any debtor to pay his debt to the estate of the man who might become a bankrupt. Accordingly the Court decided that the proper procedure in such a case was that the defendant debtor should pay the money into Court to remain there until the Court could see who was the person properly entitled to it. That, as was pointed out, depends upon a certain contingency: if bankruptcy proceedings are not taken within three months, then the money belongs to the plaintiff, but if they are taken and adjudication follows, then the trustee of the estate is the person entitled to the money thus paid into Court. Now, in the present case, the defendants have, in my opinion, accurately followed that procedure. Immediately after appearance they took out a summons asking leave to pay this money into Court, alleging that they had notice of an act of bankruptcy committed by the plaintiff. I think that it was the duty of the plaintiff, when he knew that the defendants had notice of an act of bankruptcy, to intimate with the writ his consent to the money being paid into Court, in which case there would have been practically no costs. He did not do so, and the defendants took the course which occasioned these costs, as they were entitled and, I think, bound to do. In these circumstances, what ought to be the order as to costs? I have no doubt that the defendants are entitled to the costs of the action. It appears to me that the closest analogue to the present case is the case where there has been a tender of the debt before action. When there has been a tender of the debt before action which has been refused, and an action is brought to recover the debt, the defendant can plead tender before action, but only upon the terms that he brings the money into Court. If he does this, he is entitled to the costs of the action, because tender before action, coupled with payment into Court, constitutes

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a complete defence. Here, indeed, there has been no tender before action, but that is the fault of the plaintiff; and it appears to me that the defendants, who immediately after the action was commenced brought the money into Court and stated the facts which demonstrated the impossibility of making a tender, ought to be put in the same position as a man who has properly pleaded tender before action and has brought the money into Court and has thereby succeeded in the action. I think, therefore, that the order ought to have been that the plaintiff should pay the defendants' costs.

Buckley L.J. The plaintiff was a customer of the defendant bank, and at the material time there was a balance due to him on his current account. On February 24 the plaintiff, by his solicitor, gave notice to the bank of an act of bankruptcy which he had just committed. That having been done, on March 29 the plaintiff asked the bank to pay him the amount standing to the credit of his current account, and the bank refused to pay. They could only refuse, for they had notice of an act of bankruptcy. If that had been followed by an adjudication, the title of the trustee in bankruptcy would have related back and they would have paid the wrong person. Upon that refusal the plaintiff issued the writ in this action.

It follows from the judgment in *Ponsford, Baker & Co.* v. *Union of London and Smiths Bank* (1) that he was entitled to issue that writ. The position was anomalous. At the moment when the writ was issued a right of action resided in the plaintiff, but, if there had been an adjudication within three months of the act of bankruptcy, that would have related back and the right of action would have been vested not in the plaintiff but in the trustee. On the day when the writ was issued it was impossible to say whether the plaintiff was or was not a good plaintiff; but, as decided in *Ponsford, Baker & Co.* v. *Union of London and Smiths Bank* (1), he was to be treated as a good plaintiff in the sense that it was no answer for the debtors to say that, although they owed the money to somebody, they could not say whether it was to the debtor or to his possible trustee in

(1) [1906] 2 Ch. 444.

bankruptcy, and that therefore they would not pay anybody. That knot was cut by the Court of Appeal by saying that in that state of things the debtor ought to pay the money into Court to remain there until it is seen whether it ought to be paid to the plaintiff or to his trustee in bankruptcy. In order to arrive at that result the defendants issued a summons and obtained such an order as is justified by the decision in *Ponsford, Baker & Co.* v. *Union of London and Smiths Bank* (1), that is, an order that "under the circumstances disclosed in the affidavit the defendants be at liberty to pay into Court the amount claimed on the writ, the costs of this application to be reserved." At that stage the action, in my opinion, ought to have been stopped until the contingency had been answered either the one way or the other.

I may add this, that I think that the defendants ought not to have been left by the plaintiff to issue that summons. I think that, in such a claim as this, the plaintiff who was entitled to issue the writ ought with his writ to have intimated to the defendants that, knowing the peculiar circumstances, he could not ask them to pay him because it might be that they would afterwards have to pay his trustee, but that they should pay the money into Court and that he would assist them to obtain a proper order, and that the money should remain in Court. The plaintiff did not do that. In that state of things I think that the plaintiff ought to have awaited further developments. Down to that time there were no costs of any moment; such costs as there were ought to be dealt with on the footing that the defendants had made, assuming they could have made, a tender to the plaintiff, in which case they would get their costs of the action. The plaintiff, however, issued a summons for judgment under Order xiv. That was quite wrong. He was not entitled to judgment. If he had got judgment, he could have issued execution and obtained a payment to which, as I have already said, he was not entitled. He was not entitled to judgment at that stage. If any judgment could then be pronounced, it would be to the effect that the money be paid into Court to be specially dealt with by payment to the plaintiff if there should

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not be an adjudication in bankruptcy, and to the trustee in bankruptcy if there should be an adjudication. The Court, however, does not make contingent orders. The money would be allowed to remain in Court until the contingency had worked itself out, and then an order made for payment of the money to the proper person. The plaintiff, however, did apply for judgment, and ultimately after the three months had expired an order was made under Order xiv. that he be at liberty to sign final judgment for the amount indorsed on the writ with interest (if any) and that the amount paid into Court should be paid out to his solicitor without further authority, and that each party should pay their own costs of action, except that the defendants should pay the plaintiff's costs of the application to pay into Court. At the date when that order was made the contingency had resulted in favour of the plaintiff, there having been no adjudication in bankruptcy. The question now is whether that order is right in respect of costs. In my opinion the order is wrong as to the costs. The defendants are entitled to their costs of the action. The plaintiff never was in a position to say that the defendants were keeping him out of money to the payment of which he was entitled. The defendants did the only thing they could do; they paid the money into Court under a proper order. I think that they are entitled to the costs of the action including the costs of the application to pay into Court.

*Appeal allowed.*

Solicitors for plaintiff: *Robbins & Co.*
Solicitors for defendants: *Cameron, Kemm & Co.*

W. J. B.

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*July* 29.

[COURT OF CRIMINAL APPEAL.]

## THE KING *v.* BANKS.

*Criminal Law—Pleading—Autrefois Acquit—Right to plead after Plea of Not Guilty—Double Plea.*

The appellant and another person were charged upon a coroner's inquisition with the murder of a child, and the appellant was also charged alone upon an indictment with the manslaughter of the child, to both of which they pleaded respectively not guilty. Counsel for the prosecution offered no evidence upon the coroner's inquisition for murder, and the jury by direction of the judge found a verdict of not guilty upon the inquisition. Before the jury were sworn to try the indictment the appellant handed in an additional plea of autrefois acquit, and, the jury having been sworn, the appellant was first tried upon that plea. By direction of the judge, the jury found against the appellant on that plea, and he was then tried upon his plea of not guilty and was convicted. Upon appeal against the conviction on the ground that the judge ought to have held that the plea of autrefois acquit was good:—

*Held*, that the appellant, after having pleaded not guilty to the indictment, was not entitled to plead autrefois acquit in addition thereto so long as the plea of not guilty stood upon the record, and that therefore he could not rely upon that plea as a ground for quashing the conviction.

Appeal against conviction.

The appellant and a woman named Douglas were charged at the Central Criminal Court upon a coroner's inquisition with the murder of a child. The appellant was also charged alone upon an indictment with the manslaughter of the child. When the case was before the magistrate the charge against the woman was dismissed, and the charge against the appellant was reduced to one of manslaughter, upon which the magistrate committed the appellant for trial.

At the Central Criminal Court the appellant and the woman were arraigned before Darling J., and they pleaded not guilty to the coroner's inquisition, and the appellant pleaded not guilty to the indictment. The jury were then sworn, and counsel for the prosecution stated that he proposed to offer no evidence on the coroner's inquisition, and he asked that that should be disposed of first,

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before trying the indictment against the appellant for manslaughter. Darling J. assented to that course being taken, and the appellant and the woman were given in charge to the jury upon the coroner's inquisition for murder, whereupon counsel for the prosecution stated that he offered no evidence upon that charge. The learned judge thereupon directed the jury to return a verdict of not guilty of murder in respect of both prisoners, stating that there was another charge to be tried against the appellant. The jury returned a verdict of not guilty of murder, and the woman was discharged. Upon the following day the appellant was brought up for trial upon the indictment for manslaughter, and the jury were about to be sworn when counsel for the appellant stated that the appellant desired to add an additional plea to the indictment, and he handed in a plea of autrefois acquit, which the learned judge directed the clerk of the Court to take, stating that the appellant "pleads not guilty and autrefois acquit." No objection was taken by the prosecution to that plea. The jury were then sworn (1), and the learned judge directed the appellant to be tried first upon the plea of autrefois acquit, and the appellant was given in charge to the jury upon that plea. Formal evidence as to what had taken place when the prisoners were given in charge to the jury upon the coroner's inquisition having been given, the learned judge held that there was no evidence in support of the plea, the appellant in the circumstances never having been in peril of being convicted of manslaughter upon the coroner's inquisition, and he directed the jury to find that the appellant had not been autrefois acquit. The jury so found, stating that they agreed with the learned judge's opinion, and the appellant was then given in charge to the jury and tried upon his plea of not guilty to the indictment, and was found guilty.

The arguments on the appeal were begun on July 24 before a Court consisting of Lord Alverstone C.J., Pickford and Avory JJ., when the case was ordered to be argued before a Court of five judges. The case was accordingly argued on July 29 before Lord Alverstone C.J., Lawrance, Phillimore, Pickford, and Hamilton JJ.

(1) Apparently a fresh jury were sworn on this day.

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*A. S. Carr*, for the appellant. The learned judge ought to have directed the jury to find for the appellant upon the plea of autrefois acquit. "If a man be acquit generally upon an indictment of murder, autrefois acquit is a good plea to an indictment of manslaughter of the same person": 2 Hale, P. C., p. 246; and it is immaterial that the acquittal is upon a coroner's inquisition: 1 Chitty's Criminal Law, 2nd ed., p. 163. "The true test by which to decide whether a plea of autrefois acquit is a sufficient bar in any particular case is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first": Broom's Legal Maxims, 8th ed., p. 274; Paley on Summary Convictions, 8th ed., p. 168; which passage was referred to by Field J. with approval in *Wemyss* v. *Hopkins*. (1) That test applies to the case where no evidence is in fact given upon the first indictment. The plea is proved by production of the record, and formal evidence of identity, and the Court cannot go behind the record. "Even an erroneous acquittal is conclusive until the judgment be reversed; so that if a judge direct a jury to acquit the prisoner on any ground, however fallacious, he is entitled to the benefit of the verdict": 1 Chitty's Criminal Law, 2nd ed., p. 458; see also 2 Hale, P. C., p. 247. Upon the coroner's inquisition the appellant was in peril of being found guilty of the manslaughter of the child. From the moment that the appellant was given in charge to the jury upon the coroner's inquisition he was in peril of being convicted upon the trial of that inquisition of manslaughter. The prosecution might or might not have offered evidence upon that inquisition, and the appellant's rights cannot be affected by any course which the prosecution might choose to adopt after that, as he had no control over the prosecution. Inasmuch as the appellant could have been convicted on the coroner's inquisition, he is entitled to be acquitted upon the plea of autrefois acquit to the indictment, "and whether at the former trial the proper evidence was adduced before the jury or not is immaterial; for if by any possible evidence that could have been produced he could have been convicted on that indictment he is now entitled to be acquitted"

(1) (1875) L. R. 10 Q. B. 378, at p. 382.

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per Burrough J. in *Rex* v. *Sheen*. (1) The proper course in order to avoid a plea of autrefois acquit is to abstain from taking a verdict upon the coroner's inquisition until after the trial of the indictment: 1 East, P. C., p. 371. Nothing that Darling J. said when he directed the jury to return a verdict against the plea of autrefois acquit as to there being an indictment for manslaughter against the appellant can affect the appellant's rights. The fact that the appellant was tried on the coroner's inquisition jointly with another person is not material: *Rex* v. *Dann*. (2) No doubt if there is a defect in the indictment, the defendant was never legally in jeopardy: *Reg.* v. *Drury* (3); *Rex* v. *Reader* (4), cited in *Rex* v. *Bowman* (5); 1 Chitty's Criminal Law, 2nd ed., p. 458. That was not the case here. The Court cannot deal with this case under the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, because if the plea of autrefois acquit had been properly tried and effect given to it, the trial upon the indictment for manslaughter could not have proceeded. [*Reg.* v. *Tancock* (6), and *Langmead* v. *Maple* (7) were also referred to.]

[PHILLIMORE J. Had the appellant any right to plead autrefois acquit after he had pleaded not guilty to the indictment? See 1 Chitty's Criminal Law, 2nd ed., pp. 434, 435; Archbold's Criminal Pleading, 24th ed., p. 168. The appellant ought to have pleaded autrefois acquit first, and then pleaded over to the felony: 1 Chitty's Criminal Law, 2nd ed., p. 460; Archbold's Criminal Pleading, 24th ed., p. 181.]

A defendant at the same time that he pleads autrefois acquit generally pleads over to the felony: Archbold's Criminal Pleading, 24th ed., pp. 180, 181; *Reg.* v. *Drury*. (8) A plea of autrefois acquit is a plea in bar and not in abatement, and it is in the latter case that the plea must be pleaded before the plea of not guilty: Archbold's Criminal Pleading, 24th ed., p. 170. A plea of autrefois acquit is not inconsistent with a plea of not guilty, and there is no objection to a defendant pleading both

(1) (1827) 2 C. & P. 634, at p. 639.
(2) (1835) 1 Moo. C. C. 424.
(3) (1849) 3 Car. & K. 193, at p. 199.
(4) (1830) 4 C. & P. 245.
(5) (1834) 6 C. & P. 337, at pp. 341, 342.
(6) (1876) 13 Cox, C. C. 217.
(7) (1865) 18 C. B. (N.S.) 255.
(8) 3 Car. & K. 193, at p. 200.

pleas. The appellant when first arraigned upon the indictment was obliged to plead not guilty, because the coroner's inquisition had not then been disposed of. As soon as he was acquitted upon the coroner's inquisition he pleaded autrefois acquit to the indictment. That was the only time he could do so, and the learned judge accepted the plea without objection and tried the issue upon it. It became then equivalent to a plea of autrefois acquit with a plea of not guilty over. The learned judge having in his discretion allowed the plea, this Court has no power under the Criminal Appeal Act, 1907, to interfere with the exercise of that discretion in favour of the appellant. [*Reg.* v. *Strahan* (1) was also referred to.]

*Travers Humphreys*, for the prosecution. With reference to the point that the appellant had no right to plead autrefois acquit after a plea of not guilty, there is a difficulty in the way of the prosecution taking that point, because no objection was taken to the admission of the plea at the trial, and the verdict of the jury was taken upon it.

[LORD ALVERSTONE C.J. That cannot affect the jurisdiction of this Court. You must argue both points.]

It is clear upon the authorities that as a general rule a defendant cannot plead two pleas unless allowed to do so by statute. He cannot plead double.

Upon the other point, the appellant was never in peril of being convicted of manslaughter upon the coroner's inquisition. In all the cases cited there was a trial of the first indictment upon the facts, and it is a question for the jury whether the defendant was in peril upon the first indictment. In *Rex* v. *Lea* (2) it was held that a verdict for a prisoner on an issue of autrefois acquit could not be set aside and a new trial had, though without evidence and against the opinion of the judge. The expression "in peril" has no technical meaning; it means that the defendant must have been in fact in peril. The jury can go behind the record for this purpose and inquire into the facts, and upon the evidence here it was clear that the appellant never was in peril of being convicted of manslaughter upon the coroner's inquisition, counsel for the prosecution expressly stating that the charge of

(1) (1855) 7 Cox, C. C. 85. (2) (1837) 2 Moo. C. C. 9.

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manslaughter would be tried upon the indictment. The learned judge was right upon the facts in ruling that there was no evidence to support the plea of autrefois acquit, but if he ought to have left it to the jury, it must be taken that they found against the plea, because they expressed their concurrence with the view of the learned judge.

*A. S. Carr* in reply.

The judgment of the COURT was delivered by

LORD ALVERSTONE C.J. The appellant and another person pleaded not guilty to a coroner's inquisition for the murder of a child and at the same time the appellant pleaded not guilty to an indictment for the manslaughter of the child. When the case came before Darling J. at the Central Criminal Court, counsel for the prosecution said that he did not propose to offer any evidence upon the coroner's inquisition for murder, stating that there was an indictment against the appellant for manslaughter which would be tried. The learned judge assented to that course being taken. Accordingly the jury returned a verdict of not guilty of murder upon the coroner's inquisition. When the appellant was about to be tried upon the indictment for manslaughter his counsel stated that the appellant desired to add an additional plea, and he handed in a plea of autrefois acquit, and the learned judge directed the clerk of the Court to take that plea. The appellant was in the first place given in charge to the jury upon this fresh plea, and the learned judge held that there was no evidence to support it, and upon his direction the jury returned a verdict against the appellant upon that plea. The appellant was then tried upon his plea of not guilty and was convicted.

The appellant now appeals against his conviction, and it has been argued on his behalf that he ought to have succeeded upon the plea of autrefois acquit. It is said that upon the charge of murder on the coroner's inquisition the appellant might have been convicted of manslaughter, if the jury had thought fit, and that therefore he had been in peril of a conviction for manslaughter, and, having been acquitted on the coroner's inquisition, the plea was good. This is a point of the highest technicality, because if

counsel for the prosecution had anticipated it, he would have elected to have the appellant tried upon the indictment for manslaughter first, and upon his conviction on that indictment would have offered no evidence upon the coroner's inquisition. The point being an extremely technical one may properly be met by a technical answer. It has been pointed out by my brother Phillimore that the appellant, having already pleaded not guilty to the indictment for manslaughter, was not entitled to add a plea of autrefois acquit. No doubt the learned judge directed the clerk of the Court to take the plea, but there was no point raised before him as to any question of discretion to allow the plea, and there was therefore no question of any exercise of discretion. The passages cited from Chitty's Criminal Law, vol. i., 2nd ed., p. 460, and Archbold's Criminal Pleading, 24th ed., p. 181, seem to indicate the proper course to be pursued where a defendant desires to avail himself of the double defence. In our opinion, according to well-established rules of criminal pleading, a defendant, having pleaded not guilty to an indictment, is not entitled, while that plea is standing, to have a plea of autrefois acquit put upon the record. The appellant therefore, having already pleaded not guilty to the indictment, was not entitled, while that plea was standing, to plead autrefois acquit as well. We doubt, though we do not wish to express any opinion upon it, whether in any circumstances double pleas can be allowed unless there is statutory authority for them. That is sufficient to dispose of this appeal.

We wish it to be distinctly understood, however, that we express no opinion upon the point which has been so elaborately argued before us as to whether the appellant was ever in peril of being convicted of the manslaughter of this child, and was entitled upon that ground to succeed upon the plea of autrefois acquit. So far as we have heard, there does not seem to be any authority for the application of that doctrine where there has not been a trial upon the facts, but we express no opinion upon it, because the question may come before this Court on a subsequent occasion, and further consideration may shew that effect ought to be given to the contention. We decide this case upon the ground that the appellant was not entitled to put the plea of

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autrefois acquit upon the record at the stage of the proceedings at which he pleaded it. Further, it seems to us quite plain that there was no miscarriage of justice within the meaning of s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, and this appeal must be dismissed.

*Appeal dismissed.*

Solicitor for appellant: *Registrar of the Court of Crimina Appeal.*

Solicitor for prosecution: *Director of Public Prosecutions.*

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*Applied.* HELMAN *v.* HORSHAM AND WORTHING ASS. COM. [1948] 2 All E.R. 588.

*Referred to.* HELMAN'S CASE. [1949] 1 K. B. 62

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[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

## KENT *v.* FITTALL.

*Parliament—Registration of Voters—Revising Barrister—Evidence—Occupier—Dwelling-house—Objection—Prima facie Proof—Rebuttal—Occupation of Part of a House—Owner resident in Part and rated for the Whole—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 7—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 3, 4, 19—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 14 ; *s.* 28, *sub-ss.* 10, 11.

A person objecting to the name of a voter in a list of electors, as the occupier of a dwelling-house, having given prima facie proof of the ground of objection within the meaning of s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, by proving (1.) that the dwelling-house formed part of a building which would itself be ordinarily described as a dwelling-house, (2.) that the landlord resided in the building, and (3.) that the landlord was rated for the whole of the building, the voter proved that no services were rendered by the landlord, that the landlord claimed no right and never in fact exercised any right of control over the dwelling-house, and that at the time of letting the dwelling-house no terms were specifically mentioned either by the landlord or the voter except as to the number and situation of the rooms constituting the dwelling-house, the amount of the rent, and the times at which it was payable.

The premises occupied by the voter did not come within the provisions of ss. 3 or 4 of the Poor Rate Assessment and Collection Act, 1869 :—

*Held* by the King's Bench Division, that the voter had not proved himself entitled to have his name inserted in the list within sub-s. 11 of s. 28 of the Act of 1878.

*Held* by the Court of Appeal, that the voter was not entitled to have

his name inserted in the list, upon the ground that he had not been rated or paid rates in respect of the premises occupied by him, and the owner could not in such a case be legally rated instead of the occupier.

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CASE stated by the revising barrister of the parliamentary borough of Devonport.

1. At the Court held before the revising barrister some 250 persons were objected to, they being either claimants to have their names inserted in division I. of the occupiers' lists of their respective wards (hereinafter called "the claimants") or persons whose names had been placed in the said lists by the overseers (hereinafter called "the voters"). Both claimants and voters asserted the right to be upon the register in respect of occupation as tenants of dwelling-houses named in the said lists within the meaning of s. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102) (1), and s. 5 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26). (2) In the

(1) Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 3: "Every man shall . . . . be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows; (that is to say,)

"1. Is of full age, and not subject to any legal incapacity; and

"2. Is on the last day of July" (now July 15, see s. 7 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26)) "in any year, and has during the whole of the preceding twelve calendar months been, an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough; and

"3. Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises; and

"4. Has on or before July 20 in the same year bona fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the said premises up to the preceding January 5:

"Provided that no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house."

(2) Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 5: ". . . . In and for the purposes of the Representation of the People Act, 1867, the term 'dwelling-house' shall include any part of a house where that part is separately occupied as a dwelling, . . . .

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case of the voters the appellant duly objected to each of their names being retained on the said lists on the ground in each case that the voter had not occupied as owner or tenant the premises

"For the purposes of any of the Acts referred to in this section, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part . . . ."

Sect. 28: "A revising barrister shall, with respect to the lists of voters for a parliamentary borough and the burgess lists for a municipal borough which he is appointed to revise, perform the duties and have the powers following: . . . .

"(9.) Subject as herein and otherwise by law provided, the revising barrister shall retain the name of every person not objected to, and also of every person objected to, unless the objector appears by himself or by some person on his behalf in support of his objection:

"(10.) If the objector so appears the revising barrister shall require him, unless he is an overseer, to prove that he gave the notice or notices of objection required by law to be given by him, and to give prima facie proof of the ground of objection, and for that purpose may himself examine and allow the objector to examine the overseers or any other person on oath touching the alleged ground of objection, and unless such proof is given to his satisfaction shall, subject as herein and otherwise by law provided, retain the name of the person objected to:

"An objection made under this Act by overseers shall be deemed to cast upon the person objected to the burden of proving his right to be on the list:

"The prima facie proof shall be deemed to be given by the objector if it is shown to the satisfaction of the revising barrister by evidence, repute, or otherwise that there is reasonable ground for believing that the objection is well founded, and that by reason of the person objected to not being present for examination, or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to:

"(11.) If such proof is given by the objector as herein prescribed, or if the objection is by overseers, then unless the person objected to appears by himself or by some person on his behalf, and proves that he was entitled on the last day of July then next preceding to have his name inserted in the list in respect of the qualification described in such list, the revising barrister shall expunge the name of the person objected to: . . . ."

named in the list for twelve months immediately preceding July 15, 1910.

2. It was proved or admitted in the case of each person objected to :—

(1.) That the dwelling-house in question formed part of a house (hereinafter called "the said house") which itself was what would be generally described as an ordinary dwelling-house ;

(2.) That the landlord resided in the said house ; and

(3.) That the landlord was rated for the whole of the said house.

These are herein referred to as "the three facts."

In certain cases the landlord was also the owner in fee of the said house.

3. In each case the barrister held that proof of the three facts was prima facie proof of the ground of objection within the meaning of s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, and thereupon in the case both of claimants and voters required the appearance before him of each of the persons objected to, either by himself or by some person on his behalf having personal knowledge of the facts, to prove that he was entitled to be in the said lists.

4. Each person objected to accordingly appeared and gave evidence and was cross-examined by the appellant.

5. Each person objected to stated, and the barrister found as facts as to each of them, that the dwelling-house in question consisted of from one to four rooms in most cases on the same floor, in certain cases on two floors. That the rooms were let unfurnished, and that the person objected to had the sole and exclusive use and occupation thereof, and used them for the ordinary purposes of living. That no services were rendered him in the rooms by the landlord, and that the landlord claimed no right to enter into or exercise any dominion or control over the rooms, nor did he in fact ever exercise such rights, either during the presence therein or absence therefrom of the person objected to. That the person objected to had free access into the said house from the street at all times of the day or night by means of a key provided by the landlord, who reserved to himself and in fact exercised no right to fasten the street door so as to render the key useless. That the person objected to had at all

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times such use of the internal staircases and passages of the said house as was necessary to give him free access to the rooms.

6. At the time of the letting of the rooms to the claimants and voters respectively no terms were specifically mentioned by either party except as to the number and situation of the rooms taken, the amount of rent payable, and the times at which it was payable.

7. The appellant contended:

(1.) That there was no evidence to rebut the prima facie proof (by the three facts) that the person objected to was a lodger.

(2.) That there was no evidence of any agreement by the landlord to part with the right of control incidental to his residence in the said house.

(3.) That there was no evidence at all of any of the persons objected to being an occupier as tenant of the room or rooms let to him.

(4.) That none of the persons objected to had been rated, nor had any other person been rated, either as an ordinary occupier or at all in respect of the room or rooms occupied by him to the rates made for the relief of the poor in the borough, and that no rates had been made for the relief of the poor in respect of such room or rooms.

(5.) That further as regards the persons whose rooms were on two floors there was no evidence to shew that their rooms being on different floors were a "dwelling-house" within the meaning of s. 3 of the Representation of the People Act, 1867, as amended by s. 5 of the Parliamentary and Municipal Registration Act, 1878, or were capable of being rated to the relief of the poor.

(6.) That further in those cases in which the landlord was the freeholder he had not divested and could not lawfully divest himself of the right to control his own house.

8. The barrister held that each of the persons objected to had proved that he was entitled in accordance with the statutes mentioned in paragraph 1 hereof to have his name retained or inserted as the case might be in the said lists in respect of his qualifications aforesaid.

9. Notice of appeal was given in each case. The appeals were

consolidated; and the town clerk of Devonport was named as respondent.

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1910. Nov. 8. *Foote, K.C.*, and *Daldy*, for the appellant. The respondent was not represented.

LORD ALVERSTONE C.J. The persons objected to in this case assert the right to have their names inserted or retained on the register of electors as being the inhabitant occupiers, as tenants, of certain dwelling-houses. The objectors have proved the three leading facts which have been more than once under consideration, namely, (1.) that the dwelling-house in question formed part of a building or structure which would itself be generally described as a dwelling-house; (2.) that the landlord resided in that building or structure; and (3.) that the landlord was rated for the whole of the building or structure.

It has been held that these three facts prima facie sustain the objection. The question before us is whether this prima facie objection has been rebutted by the facts stated in paragraphs 5 and 6 of the special case. Reliance is particularly placed on the words that the landlord "claimed no right to enter into or exercise any dominion or control over the rooms, nor did he in fact ever exercise such rights either during the presence therein or absence therefrom of the person objected to." If that statement is to be taken as meaning that each tenant had come and given evidence that the landlord had relinquished his right of control a difficult question would have arisen, but it is to be taken that the only circumstance in support of that statement is that the landlord had not in fact exercised any control, and there is no other evidence that he ever in fact relinquished or that he told the tenant that he had relinquished his right of control. Therefore, prima facie proof being deemed to be given by the objector within the meaning of s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, the question we have to decide is whether that prima facie proof has been answered by the facts found by the revising barrister.

Now *Kent* v. *Fittall* (No. 1) (1) the Court of Appeal expressly

(1) [1906] 1 K. B. 60.

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stated that there was no conflict as to the law between the view taken by that Court and that taken by the Divisional Court. The point on which the Court of Appeal differed from this Court was in regarding the findings of the revising barrister as findings of fact and not as inferences of law. I do not wish to repeat what I said in my judgment in that case (1); I only say that in my view the cases of *Bradley* v. *Baylis* (2), *Morfee* v. *Norris* (3), and *Kirby* v. *Biffen* (4) establish that when these three main facts are proved there is strong prima facie ground for coming to the conclusion that the landlord has control of the house and that the other inhabitants are not entitled to be registered as inhabitant occupiers. That view simply followed the judgments of Jessel M.R. and Brett L.J. in those cases. The decision of this Court was taken to the Court of Appeal, and in giving judgment in that Court Collins M.R. said (5): "There is no conflict as to the law between the view taken in the Court below and that which I hold, but it seems to me that the revising barrister was the judge of the facts and that the decision of the case must turn upon the facts as found by him. If we had before us all the evidence upon which the barrister has arrived at his conclusion as to the control of the landlord, the matter might have been different. It might have been possible to say that the conclusion could only have been arrived at by misdirection on a matter of law, but on the case before us there is nothing to shew this." We have now therefore to consider whether there was any evidence on which the revising barrister could come to the conclusion that the prima facie case made by the objector was rebutted. It seems clear that the mere fact that nothing was said except as to the terms on which rent was payable would not of itself amount to an agreement by the landlord to give up his right of control. He resides in the building himself; as a general rule he does so for the purpose of exercising control over the whole building. How can it be said that, when he lets rooms in the building and says nothing about surrendering his right of control, there is evidence that he has surrendered his

(1) (1905) 1 Smith, Reg. Cas. 417.
(2) (1881) 8 Q. B. D. 195.
(3) (1881) 8 Q. B. D. 200.
(4) (1881) 8 Q. B. D. 201.
(5) [1906] 1 K. B. 60, at p. 69.

right of control? If it was established in the case of any particular house that there had been occasions when the conduct of the tenant was such that any reasonable landlord living in the house would have interfered or would have attempted to exercise control, and had not done so, the revising barrister would be justified in that state of facts in drawing the conclusion that the landlord had given up his right of control. I should myself attach no importance to the fact of the landlord going into the rooms for the purpose of repairing what he was bound to repair; that would not of necessity be an exercise of the right of control of the character we are now considering. But it seems to me that something more must be proved than the fact that the landlord has never in fact exercised control. It may be that there has been no occasion for him to exercise that kind of control which would be necessary in order to establish that he had control over the house, and was there for that purpose. In other words, one cannot, from the mere absence of the exercise of a right, draw the conclusion that the landlord has given up the right, if there is no evidence shewing that occasions had arisen when he ought to have exercised the right. I come, therefore, to the conclusion that these two facts—namely, that at the time when the agreement of tenancy was made nothing was said as to control, and that nothing more was proved except that there had been in fact no control exercised by the landlord—are not of themselves sufficient to rebut the inference which ought to be drawn from the three principal facts and the other facts in this case. Therefore, in my opinion, the revising barrister was wrong and this appeal must be allowed.

DARLING J. I am of the same opinion. It is much to be regretted that the respondent is not represented on this appeal. One reason for naming the town clerk as respondent is that the case may be argued on both sides; if this is not done the decision cannot be delivered or accepted with such confidence as it ought to command.

Now when a person owns a house and lives in it and lets off portions of it to others, it does not follow in fact or in law that he has renounced all control over the portions he has let. Why

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should he live in the house unless it be to exercise that control, which he retains unless and until he parts with it? That it is his until he parts with it is clear, because in *Kent* v. *Fittall* (No. 1) (1) the Court of Appeal treated as fatal to the respondent the finding of the revising barrister that the landlord had renounced all right of control over that part of the premises occupied by the claimant. In that case Romer L.J., after saying that the mere fact that the landlord comes into occupation of part of the house in question does not of necessity change those who were tenants into lodgers, said that the essential point to consider is the right of control on the part of the landlord. It follows that the right of control remains in the landlord unless renounced by him. Then was there in this case any evidence on which the revising barrister could properly find that the landlord had renounced his right of control? All that is found is that at the time of the letting no terms were specifically mentioned by either party except as to the number and situation of the rooms taken, the amount of rent payable, and the time at which it should be paid. It seems clear then that there was no renunciation by the landlord of any right of dominion which he had over this house. The revising barrister further says that no services were rendered to the tenants by the landlord, and that the landlord claimed no right to enter into or exercise any dominion or control over the rooms. But there is no statement that occasion ever arose when the landlord might be expected to exercise, if he had the right to exercise, the right of control and did not do so. Many rights exist which nevertheless are not asserted until occasion arises to put them in force; the mere fact that occasion does not arise does not disprove or divest the right. In my opinion it comes back to this, the landlord remains on these premises for some purpose, presumably for the purpose of exercising control; that presumption cannot be displaced except by affirmative evidence; there is no such evidence here; and therefore I agree that the appeal must be allowed.

PICKFORD J. I agree. It has been established by many cases that if a man lets off rooms in a house in which he himself

(1) [1906] 1 K. B. 60.

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resides, although he may give to other persons exclusive occupation of parts of the house and render no services to those inmates, he nevertheless prima facie retains control, and the inmates are lodgers and not occupying tenants. *Bradley* v. *Baylis* (1) is such a case. In *Kent* v. *Fittall* (No. 1) (2) the argument was pressed upon the Court of Appeal that a person who resides in part of a house cannot claim as an inhabitant occupier if his landlord lives in the same house, because the residence of the landlord is incompatible with the claim. To this argument Collins M.R. said (3): "It seems to me on principle that it cannot be affirmed as a matter of law that the co-existence of the landlord as an occupier of another and a distinct subject-matter is a bar to the claim of the tenant to a separate tenancy, any more than if the landlord lived next door or in the next street." The judgment of Romer L.J. is to the same effect, "If this inmate," said the Lord Justice (4), "was an occupying tenant under the Act, does, as a matter of law, the occupancy by the landlord of part of the house, of necessity and by itself, turn what would otherwise be an occupying tenancy into a case of a lodger holding? I think not, and I agree with the decision arrived at by the Irish Court of Appeal in *M'Laughlin* v. *Chambers* (5) and with the reasons given by the judges for the conclusion to which the Court came."

Mathew L.J. expresses the same opinion in these words (6): "In the case before us the findings of fact shew in the clearest way that there was exclusive occupation in the fullest sense of the term without any interference on the part of the landlord. Why is not effect to be given to these findings? It is said that we ought not to act on them because the revising barrister disregarded an imperative rule of law, to the effect that there cannot be exclusive occupation of a room in a house if the landlord lives in another room, or rooms, of the house. In my opinion that is incorrect, and extraordinary results would arise if the residence of the landlord in the house were the conclusive criterion of whether the other inmates had separate occupation

(1) 8 Q. B. D. 195.
(2) [1906] 1 K. B. 60.
(3) Ibid. at p. 69.
(4) [1906] Ibid. at p. 75.
(5) [1896] 2 I. R. 497.
(6) [1906] 1 K. B. 60, at p. 77.

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of other parts of the house." Therefore the question which the Court was there considering was the question, is it as a matter of law conclusive that the landlord has control because he lives in the same house? That question, the Court held, must as it stands be answered in the negative; it is true that prima facie he retains control, but it may be shewn that he has parted with control. In that case the Court held itself concluded by the finding of the revising barrister that the landlord had parted with control; but Collins M.R. went on to say (1): "If we had before us all the evidence upon which the barrister has arrived at his conclusion as to the control of the landlord, the matter might have been different. It might have been possible to say that the conclusion could only have been arrived at by misdirection on a matter of law." In the present case the barrister has stated the evidence on which he has acted. It is set out in paragraphs 5 and 6 of the case; and he has told us that he meant no more than this, that the landlord had never communicated to the inmates that he claimed the right to exercise any control. Then the question is whether the barrister has arrived at his conclusion by a misdirection when he holds that the facts afford evidence of a renunciation of control. I think that he has. The mere fact that the landlord expressed no intention of reserving that which remained in him until renounced is no evidence that he intended to renounce it. For these reasons I agree that the appeal must be allowed.

I must say I share my brother Darling's regret that it has not been thought necessary to instruct anybody to appear for the respondent.

LORD ALVERSTONE C.J. I entirely agree with the observations made by my learned brothers as to the unfortunate fact that this appeal has not been argued by anybody on behalf of the respondent.

*Appeal allowed.*

W. H. G.

G. J. Petherbridge, one of the persons objected to, appealed.

Upon the hearing of the appeal counsel for the appellant argued

(1) [1906] 1 K. B. 60, at p. 69.

only the point upon which the decision of the Divisional Court was given; but counsel for the respondent, having argued that point, proceeded to argue the other objection stated in paragraph 7 (4.) of the special case. The Court expressed no opinion upon the first point, and therefore it is deemed unnecessary to report the arguments thereon.

In the Court of Appeal it was admitted that the premises occupied by the persons claiming or objected to did not in any of the cases come within ss. 3 or 4 of the Poor Rate Assessment and Collection Act, 1869. (1)

(1) By the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 7, "Where the owner is rated at the time of the passing of this Act to the poor rate in respect of a dwelling-house or other tenement situate in a parish wholly or partly in a borough, instead of the occupier, his liability to be rated in any future poor rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs:

"1. After the passing of this Act no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough shall be rated to the poor rate instead of the occupier except as hereinafter mentioned:

"2. The full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate book:

"Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate:"

By the Poor Rate Assessment and Collection Act, 1869, (32 & 33 Vict. c. 41), s. 3, "In case the rateable value of any hereditament does not exceed 20*l.*, if the hereditament is situate in the metropolis, or 13*l.*, if situate in any parish wholly or partly within the borough of Liverpool, or 10*l.*, if situate in any parish wholly or partly within the city of Manchester or the borough of Birmingham, or 8*l.* if situate elsewhere, and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and allow to him a commission not exceeding twenty-five per cent. on the amount thereof."

Sect. 4: "The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which section three of this Act extends, situate within such parish, shall be rated to the poor rate in respect of such rateable hereditaments, instead of the occupiers, on all rates

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1911. July 19, 20. *Danckwerts, K.C.*, and *Raymond Asquith*, for the appellant.

*Foote, K.C.* (*Daldy* with him), for the respondent. Under s. 3 of the Representation of the People Act, 1867 (1), it is a necessary

made after the date of such order; and thereupon and so long as such order shall be in force the following enactments shall have effect:

"1. The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per centum from the amount of the rate:

"2. If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow him a further abatement or deduction not exceeding fifteen per centum from the amount of the rate during the time he is so rated: . . . .

"Provided that this clause shall not be applicable to any rateable hereditament in which a dwelling-house shall not be included."

Sect. 19: "The overseers in making out the poor rate shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupier's column of the rate book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid; and if any overseer negligently or wilfully and without reasonable cause omits the name of the occupier of any rateable hereditament from the rate, or negligently or wilfully misstates any name therein, such overseer shall for every such omission or misstatement be liable on summary conviction to a penalty not exceeding two pounds: provided that any occupier whose name has been omitted, shall, notwithstanding such omission and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted."

By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 14: "Whereas by s. 19 of the Poor Rate Assessment and Collection Act, 1869, the overseers in making out the poor rate are required in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, to enter in the occupier's column of the rate book the name of the occupier of every rateable hereditament, and it is thereby declared that every such occupier shall be deemed to be duly rated for any qualification or franchise as therein mentioned; and whereas doubts have been entertained as to the application of this enactment, and it is expedient to remove them: Be it therefore enacted that the recited enactment shall not be deemed to apply exclusively to cases where an agreement has been made under s. 3 of the same Act, or where an order has been made under s. 4 of the same Act, but shall be of general application."

(1) 30 & 31 Vict. c. 102.

condition to obtaining the franchise as an inhabitant occupier of a dwelling-house that the occupier should be rated and pay rates in respect of the dwelling-house for which the vote is claimed. There are some exceptions where the owner can be rated instead of the occupier, but this case does not come within any of those exceptions. Sect. 7 of the Act of 1867 puts an end to the rating of the owner instead of the occupier, but makes one exception in the case of a dwelling-house wholly let out in apartments or lodgings not separately rated. That exception, however, cannot include the case where the landlord himself occupies part of the house. Then came the Poor Rate Assessment and Collection Act, 1869 (1), which by ss. 3 and 4 provides that in the case of hereditaments the rateable value of which does not exceed a certain amount the owner may be rated instead of the occupier; and s. 19 enacts that where the owner pays the rates, or is liable to be rated instead of the occupier, the name of the occupier must be inserted in the occupiers' column of the rate-book, and the occupier shall be deemed to be duly rated for the purpose of the franchise. That does not apply to the present case because the value of the premises exceeds the prescribed amount. Doubts arose as to the extent of the application of s. 19, whether it applied to any cases except those within ss. 3 and 4 of the Act, and it was enacted by s. 14 of the Parliamentary and Municipal Registration Act, 1878 (2), that s. 19 of the Act of 1869 should "be of general application." That means only that s. 19 is to apply generally to all cases where there is statutory power to rate the owner instead of the occupier, and not that it is to apply to every case where the owner has in fact been rated instead of the occupier whether lawfully or not. It has been decided in this Court, in *White and Hales* v. *Islington Corporation* (3), that s. 7 of the Act of 1867 has not been impliedly repealed by the Act of 1869, and therefore there is one case at least to which s. 19 of the latter Act can be applied by virtue of s. 14 of the Act of 1878. That being so, in the present case the persons in question have not been rated or paid rates in respect of the dwelling-houses which they are said to occupy, and the owner

(1) 32 & 33 Vict. c. 41. (2) 41 & 42 Vict. c. 26.
(3) [1909] 1 K. B. 133.

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cannot lawfully be rated in their stead, and therefore they do not comply with the conditions of s. 3 of the Act of 1867.

*Raymond Asquith* in reply. In these cases the premises in question are capable of being separately rated; the owner has in fact been rated and the rates have been paid. Sect. 19 of the Act of 1869 applies to that state of things by reason of s. 14 of the Act of 1878. Sect. 14, when it enacts that s. 19 of the earlier Act is to be of "general application," means that it is to apply to all cases where in fact the owner is rated instead of the occupier. In *Bradley* v. *Baylis* (1) Jessel M.R. states the effect of the statutes to be that a householder who occupies a portion of a dwelling-house which is capable of being rated, whether he is rated or not, is entitled to the franchise as an inhabitant occupier; and Baggallay L.J. says the same. (2)

VAUGHAN WILLIAMS L.J. In s. 3 of the Representation of the People Act of 1867 is set out what are the qualifications which entitle a man to be registered as a voter. The last two of those qualifications are: (3.) that he has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises, and (4.) that he pays those rates. It is common ground here that neither of these conditions has been complied with. Then it might be suggested that there are exceptions to these conditions. There are exceptions under ss. 3 and 4 of the Poor Rate Assessment and Collection Act, 1869. (3) It is not contended here that the voters represented by the appellant come within either of those sections. Under those circumstances we have to look and see whether there is any exception within which they can come, and we are invited to turn to s. 14 of the Parliamentary and Municipal Registration Act, 1878. (4) That section runs thus: [The Lord Justice read the section.] It has been suggested to us that the effect of that Act is that, although the provisions of s. 3 of the Act of 1867 have not been complied with, we are to deem that the landlord has paid the rates instead of the occupier.

(1) 8 Q. B. D. 195, 217.
(2) Ibid. at p. 230.
(3) 32 & 33 Vict. c. 41.
(4) 41 & 42 Vict. c. 26.

Turning to s. 7 of the Act of 1867 one finds this provision: [The Lord Justice read the first part of the section.] The result of that section is that it is quite impossible in this case, in which no rate has been made upon or paid by the occupier, for the occupier to claim to be entitled to this franchise.

Under these circumstances this appeal must be dismissed.

FLETCHER MOULTON L.J. The right of a man to the franchise in England and the steps that he has to take to establish that right are unfortunately not fixed by any single statute, but by a tangle of statutes, and I regret very much to have to come to the conclusion that there is in this mass of statutes a casus omissus which in the present case will probably deprive a large number of people of the right to the franchise who, if they had known what were the necessary steps to take to establish their right, would probably have obtained it. We have, however, only to construe and apply the statutes, and we have no right to think of the consequences.

Now the persons whom this appeal affects are persons who occupy, in a very independent and exclusive manner, apartments in houses situated in a borough. It seems that they have, according to the description in the special case, complete and exclusive control of those apartments, using of course the staircases in common and having latchkeys so that they can go out and re-enter whenever they like. Such people may be either lodgers or persons occupying separate tenements. To be placed on the register as a lodger it is necessary to take a certain series of steps; to be registered as the occupier of a separate dwelling-house the steps are different. In the present case these parties were either placed, or claimed to be placed, on the lists as the occupiers of separate tenements and not as lodgers. The consequence is that, if they cannot establish their right to a place on the register as being occupiers of separate tenements,—separate although in the same house—they fail altogether. We have, therefore, only to look at the regulations as to the franchise in the case of what I may call householders.

These are given in s. 3 of the Representation of the People

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Act, 1867. There are four conditions with which they must comply, but we have only to deal with the third and fourth of those conditions. The third is that during the year of occupation a person seeking registration has been rated as an ordinary occupier in respect of the premises occupied by him to the poor rate made in respect of the premises; and the fourth is that he has paid those rates. Now, the persons to whom this case relates have not been rated and have paid no rates with respect to the tenements which they occupy, so that if the relevant statutes ended there they clearly would have no right to the franchise. At the date of the Act of 1867 the Legislature was insisting very strongly on rating being a condition for the franchise (other than the lodger franchise), and there then existed, under certain public Acts and certain other local Acts, provisions by which in the case of tenements of small value the owners were rated and paid the rates and the occupiers were not rated. None of those people, of course, would have obtained the franchise under the above provisions of the Act. To avoid this consequence the Legislature by s. 7 put an end to these arrangements and provided that, so far as tenements in a borough were concerned, it should operate as a termination of the liability to be rated on the part of the owners, and a prohibition for the future against rating the owner instead of the occupier except in the cases to be mentioned thereinafter. Now the only case mentioned thereinafter which concerns us is that of a dwelling-house or tenement wholly let out in apartments or lodgings not separately rated. In each case the owner was to be rated in respect thereof to the poor rate. Therefore an owner who let out the whole of his house in tenements without himself residing there still might be rated in respect of all the tenements it contained. But if he himself resided in the house (so that it was not wholly let out in tenements) the exception did not apply, and therefore the owner of each separate tenement must be separately rated.

Matters remained in that position until the year 1869, when the Poor Rate Assessment and Collection Act, 1869, was passed. That resuscitated in the case of small tenements what was then called, I think, the "compound householder." It allowed (s. 3) owners of small tenements to make agreements to pay the rates

for the occupying tenants, and in that case they received a commission, that is to say, a deduction was made from the total amount in respect of their taking the risk of collection; and by s. 4 vestries might order the owner to be thus rated instead of the occupier, if he did not ask so to be. Of course the consequence of that would have been that all the people who occupied the small tenements, to which ss. 3 and 4 of that Act applied, would have been disfranchised. To avoid that, s. 19 was passed, and it provides that the overseers shall in every case enter in the occupier column of the rate-book the name of the occupier of every rateable hereditament, and that such occupier shall be deemed to be duly rated for any qualification or franchise. That established, therefore, a kind of a constructive rating which had the effect of giving to the occupier the franchise without his physically paying rates or without his even being separately rated, thus widening the conditions of s. 3 of the Act of 1867 on which the franchise was to be obtained. It must, however, be observed that that was to be done in two cases only. The one was where the owner was liable to the payment of the rate instead of the occupier, which I have no doubt refers to the excepted case in s. 7 of the Act of 1867, namely, the case where the owner let out the whole of the premises in apartments, and, therefore, was according to that section to be rated for the whole of the premises. The other (which is the one to which the argument has mainly related) is "whether the rate is collected from the owner or occupier." What does that mean? To my mind it clearly refers to the cases where the rate was to be collected from the owner as it was under the provisions with regard to small tenements, and to the cases where it was to be directly collected from the occupier. But there is one thing to which it clearly could not apply. At this time there was a statutory prohibition against the owner of a house in which he lived, but in which he had tenants, being rated for the whole of that house, and, since that was unrepealed, it could not be that this enactment put upon the overseers the duty of putting in the occupiers' names as persons who were duly rated when they were not being rated (although they were bound to be) and were not paying any rates at all. I have, therefore, no

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doubt whatever that in spite of that Act the prohibition with regard to such tenement houses as we have to do with here remained in full force, and that s. 19 did not apply to them.

It has been urged that the ambit of s. 19 has been widened by s. 14 of the Parliamentary and Municipal Registration Act of 1878. (1) Let us consider what was the subject-matter of that enactment. Sect. 19 was a late section in an Act which provided for the compound householder, that is, for the owner, paying the rates in certain cases instead of the occupier, and it provided that in cases where the owner did pay those rates the name of the occupier should be inserted in the rate-book, and he should be deemed to have been duly rated. An idea apparently had grown up that s. 19 was only intended to apply to cases under ss. 3 and 4 of the Act of 1869. There is nothing in its language which would limit it in that way, and I should have thought that the better opinion was that it was not so limited, but the Legislature set the doubt at rest by s. 14 of the Act of 1878. That section recites s. 19 of the Act of 1869, and then declares that it shall not be deemed to apply only to cases within ss. 3 and 4 of the Act of 1869, but "shall be of general application."

In my interpretation of s. 19 I take it to be a general application, but "general application" cannot include a case where by the statute the rating must be separate on the separate tenements and where the owner is not permitted to be rated instead of the occupier. Therefore the last enactment, (though it would be relevant if one had taken the narrower meaning of s. 19 of the Act of 1869,) does not affect my judgment at all. I am of opinion therefore that under the present state of the Acts these persons, if they are, as they claim to be, the inhabitants of separate tenements, are persons who ought to be separately rated, and ought to pay an equal amount of poor rate in the pound to that which others pay, and that, therefore, they do not comply with either of the last two conditions of s. 3 of the Act of 1867 on which the franchise is granted; that there is no statutory exception which applies to their cases; and that, therefore, they are not entitled to be on the register. This appeal must, therefore, be dismissed.

(1) 41 & 42 Vict. c. 26.

BUCKLEY L.J. The revising barrister retained or inserted the names in dispute on the list of occupiers, holding that the persons concerned were entitled to the franchise as inhabitant occupiers. Against that Kent, the objector, appealed. The Divisional Court came to the conclusion that the barrister was wrong. Upon the question whether he was right or wrong two points must arise, first, whether the man was an inhabitant occupier, and, secondly, assuming that he was an inhabitant occupier, whether he was an inhabitant occupier who satisfied the conditions of s. 3 of the Act of 1867 by being rated and paying rates. The decision of the Divisional Court was based upon the first of those two points. If the landlord had no right of control, then the claimant or person objected to was an inhabitant occupier. They decided the case upon the ground that it was not shewn that the landlord had surrendered his right of control. For the purposes of this judgment I am going to assume that the landlord had no control, and that the person concerned was not a lodger but an inhabitant occupier. Then the objection is raised that after making that assumption it remains that the revising barrister was wrong upon the ground stated in the case, that none of the persons objected to had been rated, nor had any other person been rated, either as an ordinary occupier or at all, in respect of the room or rooms occupied by him, and that no rates had been made in respect of such room or rooms. The case had already stated as a fact that the landlord had been rated for the whole of the house and the rates paid in respect of the whole of the house. The objection is that the claims must fail because the separate tenements, namely, the rooms occupied by the claimants, have never been rated and no rates have been paid in respect of the separate tenements. That contention I think must succeed. The foundation of this franchise is found in s. 3 of the Act of 1867, and it is sufficient to say that it is a condition precedent to the right to the enjoyment of this franchise that the claimant has during the time of his occupation been rated as an ordinary occupier in respect of the premises so occupied by him and that he has paid the rates. It is conceded that that is not so; that the claimant has not been rated and has not paid rates. The fact is

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that the whole house as an entirety has been rated and somebody else, namely, the landlord of the whole house, has paid the whole rate. The question is whether that, under any of the statutory provisions, satisfies the conditions precedent in s. 3. The Act of 1867 was passed evidently with this purpose: it was going to make it a condition of this franchise that the person who claimed it should have paid the rates, and, therefore, by s. 7 it intended to throw the incidence of the rates in every case, subject to one exception, upon the occupier, so that the obligation to pay the rate, which of course he could satisfy, if he had the money, would lie upon him, and he would thus satisfy that which was required in order to give him the franchise. Accordingly s. 7, dealing with cases where the owner theretofore had been rated and not the occupier, of which there were many instances at that time, provided: [The Lord Justice read sub-s. 1 of the section.] Under this Act the occupier and not the owner is rateable, and having paid is entitled to the franchise. The exception in s. 7 is the case of a dwelling-house or tenement wholly let out in apartments or lodgings not separately rated, when the owner of such dwelling-house or tenement was rated in respect thereof. As to the meaning of these words "not separately rated," I assigned in *White and Hales* v. *Islington Corporation* (1) reasons for holding that that means not separately rated at the date of the passing of this Act. This exception is one which does not apply to this case, because the dwelling-house was not wholly let out in apartments; the landlord occupied part of the house. So far, then, we have a provision that, if the man be an occupier, he shall be rated and pay the rates. The Act of 1869, by ss. 3 and 4, modified that to this extent. It provided that in the case of tenements of small value as defined by the Act either one of two things might happen. The owner might voluntarily offer to pay the rates in respect of the whole house, although it was sub-divided into tenements, and if he did so he was allowed a deduction of 25 per cent. (s. 3); or, if he did not offer, there were the means under s. 4 to compel the owner of small tenements to pay the aggregate amount of the rates of the several tenements, and in that case he got a deduction of 15 per cent.

(1) [1909] 1 K. B. 183, 153.

Then the Act went on to provide by s. 19 that in those cases the rating of the owner should be deemed to be for all purposes of the franchise the rating of the occupier. Of course the purpose was, having regard to what had been done by the Act of 1867, not to disfranchise the occupiers of these small tenements who were going to have their rates paid for them under the statutory provisions, but to enable them still to have the franchise. So that thus far we have two cases in which the owner may pay; he may pay under s. 7 of the Act of 1867 if the whole house is let out in apartments or lodgings, or he may pay under ss. 3 and 4 of the Act of 1869 if there are small tenements. Then s. 19 provides for the saving of the rights of the occupiers in the case of small tenements. It was obvious that in that state of things the right of the occupier to the franchise had not been saved in the case covered by s. 7 of the Act of 1867, where the whole house was let out in lodgings. That was left unprovided for; and in 1878 s. 14 of the Act of that year provides, after reciting s. 19 of the Act of 1869, that that section "shall be of general application." It is necessary to look back to s. 19 to see what it was that was to be of general application. [The Lord Justice read the first part of s. 19.] Now this room in a house either was or was not a "rateable hereditament." I am speaking of the room as distinguished from the whole house; the whole house might be a rateable hereditament, or the one room in the house might be a rateable hereditament. This section is confined to the case where the subject-matter is the rateable hereditament, and directs that the overseers in making out the poor rate, when they come to any rateable hereditament, are to enter the name of the occupier in the occupiers' column in every case whether it is a case where the owner pays or whether it is a case where the occupier pays; but I cannot see that that section has any application where the hereditament is not a separate rateable hereditament in respect of which the entry is to be made. What has happened here is that the rating authority have treated as the rateable hereditament the whole house, and s. 14 of the Act of 1878, introducing s. 19 of the Act of 1869, therefore simply says as regards this whole house that the overseers must put the name of the occupier of the whole house into the rate-book even if he

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is not the person who pays the rates; but there are no words to provide that, if a room be a separate hereditament which has not been rated, any entry shall be made in the rate-book in respect of it. The hereditament, the room, is not in the rate-book at all, and, therefore, there is no entry to be made in the book against the room as regards the occupier. It seems to me under those circumstances that although s. 14 of the Act of 1878 made s. 19 of the Act of 1869 of general application, it only made of it general application in cases where separate rateable hereditaments under some previous system of legislation were aggregated together and the amount of the rate was paid by one person, that is to say, it dealt with the two cases of small tenements and of the whole house let out in separate tenements. Although I regret to arrive at that conclusion, it seems to me this is eminently a case in which the rateable hereditament was the whole house; the landlord of the whole house has been rated and has paid the rates in respect of the whole house, but the separate hereditament, which for the purpose of this judgment I am assuming to be the room, separately occupied without control by the landlord and occupied by the claimant, has never been rated as a separate hereditament and no rates have been paid in respect of it. For these reasons it seems to me that this second ground must succeed. It is, therefore, not necessary to decide the other point. The result is that the respondent succeeds upon the rating point and this appeal must be dismissed.

*Appeal dismissed.*

Solicitors for appellant: *Russell-Cooke & Co.*
Solicitors for respondent: *Ayrton, Biscoe & Barclay.*

W. J. B.

## COOKE *v.* RICKMAN.

1911
*July* 12, 13.

*Estoppel—Res Judicata—Action for Rent due under Agreement—Judgment for Sum admittedly due—Second Action — Defence, No Consideration for Agreement.*

The plaintiff sued the defendant in the King's Bench Division for rent alleged to be due under an agreement, and judgment was signed under Order XIV. for a part of the sum claimed which the defendant admitted that she owed. In a subsequent action in the county court between the same parties for further rent under the same agreement, the defendant raised the defence that there was no consideration for the agreement:—

*Held*, on the authority of *Humphries* v. *Humphries*, [1910] 2 K. B. 531, that the defendant having admitted in the first action that rent was due from her under the agreement was estopped from raising in the second action the defence of no consideration for the agreement.

APPEAL of the plaintiff from the county court of Hampshire holden at Newport and Ryde.

On December 17, 1910, the plaintiff issued a specially indorsed writ against the defendant in the King's Bench Division claiming "196*l.* 9*s.* 9*d.* being as to 175*l.* 9*s.* 9*d.* balance due for money lent by plaintiff to defendant and interest and as to 21*l.* amount of rents due from the defendant to plaintiff under an agreement dated the 12th day of June, 1907." The particulars shewed that four sums of 5*l.* 7*s.* 6*d.*, 6*l.*, 4*l.* 12*s.* 6*d.*, and 5*l.* were claimed in respect of the rent of four separate cottages. In answer to an application for judgment under Order XIV. the defendant filed an affidavit in which she stated that she admitted that she owed the plaintiff the item of 175*l.* 9*s.* 9*d.* for money lent and interest, and also the sum of 4*l.* 6*s.* 4*d.* in respect of the rent of the two cottages for which the sums of 5*l.* 7*s.* 6*d.* and 4*l.* 12*s.* 6*d.* were claimed, and that the plaintiff had agreed and accepted that sum in settlement of those two items; that she had paid the sum of 5*l.* before action, which the plaintiff was prepared to admit; and that she had also paid the sum of 6*l.* Judgment was signed for 180*l.* 3*s.* 1*d.*, which included the 4*l.* 6*s.* 4d. admitted to be due for rent, and leave was given to defend as to the 6*l.*, and the action was remitted to the county court, but it was not further proceeded with.

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On March 7, 1911, the plaintiff commenced the present action, claiming 17*l.* 6*s.* 1*d.* for further rent alleged to be due under the agreement of July 12, 1907. At the trial the agreement was produced, and it appeared on its face to be an agreement for which there was no consideration. It was thereupon contended for the defendant that as there was no evidence of any consideration for the agreement the claim could not be supported; for the plaintiff it was argued that as the defendant had admitted in the former action that she owed a part of the rent sued for under the same agreement, the defendant was estopped from raising in the second action the defence that there was no consideration for the agreement. The county court judge gave judgment for the defendant. The plaintiff appealed.

*Grimwood Mears*, for the plaintiff. There was in the action in the King's Bench Division an allegation of the existence of an agreement by the defendant to pay rent. That raised an issue whether the agreement was one which was binding and valid at law. That was an issue which could have been traversed by the defendant by an averment that the agreement was void for want of consideration. The defendant did not traverse that issue, but on the contrary admitted that rent was due under the agreement, and she is therefore estopped from raising the want of consideration for the agreement as a defence to this action: *Howlett* v. *Tarte* (1); *Humphries* v. *Humphries*. (2) For the purposes of estoppel a judgment obtained by consent is as effective as one pronounced by a Court after deciding a contested issue: *In re South American and Mexican Co., Ex parte Bank of England*. (3)

*Du Parcq*, for the defendant. *Humphries* v. *Humphries* (2) is distinguishable. In that case the defendant denied in the first action the existence of the agreement sued upon, and that issue was decided against him; in the second action he sought to rely on the absence of any memorandum in writing sufficient to satisfy the Statute of Frauds, and it was held that he was estopped from doing so, because the existence of a valid enforceable agreement was in issue in the former action. In the

(1) (1861) 10 C. B. (N.S.) 813. (2) [1910] 2 K. B. 531.
(3) [1895] 1 Ch. 37.

present case the writ in the first action alleged an agreement and that rent was due under it, but it contained no averment that there was consideration for the agreement, and therefore the existence of a valid enforceable agreement was not in issue, and the defendant by her admission is merely estopped from denying her signature to the agreement and that the particular rent then claimed was due. Under the old system of pleading, "where the declaration is framed upon a simple contract, it is essential that it should show that there was a good and *sufficient* consideration to support the defendant's promise": Bullen and Leake's Precedents of Pleadings, 3rd ed., p. 59; *Clarke* v. *Gray*. (1) An omission to aver consideration therefore rendered the declaration demurrable, but a failure to demur in one action did not prevent a demurrer in a subsequent action. It is still necessary in pleading to set out the consideration for a simple contract: Odgers on Pleading and Practice, 6th ed., p. 88; and the abolition of demurrers does not affect the principle of estoppel. There being no averment of consideration in the writ in the first action, the defendant does not by raising the defence of no consideration in this action offend against the rule laid down in *Howlett* v. *Tarte* (2), for it is not inconsistent with the admission made in the first action to allege that there was no consideration for the promise previously admitted. An allegation in a pleading of the existence of an agreement does not necessarily mean that the agreement is enforceable. In *Howlett* v. *Tarte* (2) the agreement was not enforceable at the time of the first action, there being then in existence the release which was afterwards relied on in the second action.

BRAY J. The question in this case is whether the defendant is estopped from setting up as an answer to the claim the fact that there was no consideration for the agreement sued upon. The facts are as follows. The plaintiff had brought a previous action against the defendant in which she claimed 196*l.* 9*s.* 9*d.*, as to 175*l.* 9*s.* 9*d.* for money lent and as to 21*l.* for rent alleged to be due from the defendant to the plaintiff under an agreement dated July 12, 1907. Proceedings were taken under Order XIV., and the

(1) (1805) 6 East, 564. (2) 10 C. B. (N.S.) 813.

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defendant filed an affidavit in which she admitted owing the sum claimed for money lent and also some money for the rent sued for under the agreement, and judgment was entered for 180*l.* 3*s.* 1*d.*, which included the sum admitted to be owing for rent. That involved an admission by the defendant that the agreement to pay rent was a valid agreement. The present action was brought to recover a further sum for rent under the same agreement. After evidence had been given the defendant's counsel submitted that it had not been proved that there was any consideration for the agreement. The contention for the plaintiff in answer to this submission was that by reason of the judgment in the previous action the defendant was estopped from setting up the defence of no consideration. The county court judge held that in the circumstances there was no estoppel.

In my opinion there was an estoppel. The law relating to this subject was discussed in *Humphries* v. *Humphries*. (1) It is true that the facts in that case were not on all fours with those of the present case, because there the defence which was sought to be raised in the second action was that there was no memorandum in writing sufficient to satisfy the Statute of Frauds, but having regard to what was said by Farwell L.J. in delivering the judgment of the Court, I have come to the conclusion that the case of *Humphries* v. *Humphries* (1) did in effect decide the question raised in the present case. I find this passage in the judgment: "The rule laid down in *Howlett* v. *Tarte* (2) is confined to allegations which the defendant could have traversed, and does not extend to pleas which confessed and avoided, or to matters which were not raisable by traverse but by special plea, necessitating proof on the part of the defendant, such as fraud, gaming, release, or infancy, allegations which do not amount to denial, but to confession and avoidance of the contract." Now, it is admitted, indeed it could not be contended otherwise, that a plea of no consideration, or a denial of the agreement, which might or might not raise the question of no consideration, is not a confession and avoidance of the agreement. It is equally clear that it is a matter raisable by traverse and not by a special plea necessitating proof on the part of the defendant. The onus was on

(1) [1910] 2 K. B. 531. (2) 10 C. B. (N.S.) 813.

the plaintiff to prove that there was consideration for the agreement, and the effect of the decision in *Humphries* v. *Humphries* (1) is that it is only in the special circumstances mentioned in the judgment that the exception to the rule of estoppel prevails. It is true that *Howlett* v. *Tarte* (2) was decided before the passing of the Judicature Act, when pleading was a matter of great strictness, and no doubt the rules under the Judicature Act do involve some looseness in pleading; but it is not necessary for us to say whether a plaintiff suing on an agreement must now expressly allege consideration, though I am inclined to think that he need not do so; nor is it necessary for us to decide whether a defendant must plead in terms the want of consideration. *Humphries* v. *Humphries* (1) shews that to avoid the estoppel the matter must be such as requires a special plea or a plea necessitating proof by the defendant. The defendant in this case could have raised the question of no consideration in the first action, and if she had done so, that would have been a matter necessitating proof, not by the defendant, but by the plaintiff. The defendant did not raise that question in the first action, and therefore, according to the principle laid down in *Humphries* v. *Humphries* (1), the defendant is estopped from raising it in the second action.

For these reasons I am of opinion that this appeal must be allowed.

BANKES J. I agree. It is contended for the defendant that the judgment in the first action does not estop the defendant from raising in the present action the plea that there was no consideration for the agreement sued upon. The rule laid down in *Howlett* v. *Tarte* (2) was that if the defendant in a second action attempts to put on the record a plea which is inconsistent with any traversable allegation in a former action between the same parties there is an estoppel. Counsel for the defendant says that in this case the writ in the first action merely stated that the rent was claimed under an agreement, and did not allege that there was any consideration for the agreement, that there was therefore no traversable allegation as to

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consideration, and that consequently the defendant is not estopped from setting up the want of consideration in the present action. The rule in *Howlett* v. *Tarte* (1) was framed at a time when, owing to the great preciseness in pleading, it could be easily ascertained what was or was not a traversable allegation in the declaration, and under the present system of pleading there may in some cases be a difficulty in applying the rule, but in *Humphries* v. *Humphries* (2) Farwell L.J. pointed out that "the allegation of the existence of the agreement raises the issue which the plaintiff has to prove, namely, the existence of that specific agreement as an agreement binding and valid at law, i.e., complying amongst other things with the requirements of the Statute of Frauds." I agree with Mr. Du Parcq to this extent, that under the present system of pleading, if an agreement were set up in a statement of claim without saying what was the consideration, the defendant would be entitled to apply to strike it out or to apply for particulars of the consideration. But if the defendant does not adopt either of those courses and proceeds to trial, it is not, in my opinion, open to him, in a second action in respect of the same subject-matter, to say that there was not a traversable allegation in the first action, because, applying the test laid down in *Humphries* v. *Humphries* (2), the consideration for the agreement sued upon is an issue which the plaintiff has to prove, and if he fails to prove consideration he fails to prove, in the words of Farwell L.J., "the existence of that specific agreement as an agreement binding and valid at law." Therefore, on this ground, and also on the ground stated by Bray J. resting on the later passage in the judgment in *Humphries* v. *Humphries* (2), I agree that the decision of the county court judge was wrong and that the appeal must be allowed.

*Appeal allowed. Leave to appeal.*

Solicitor for plaintiff: *M. C. Lamport, for Lamport, Bassitt & Hiscock, Newport, Isle of Wight.*

Solicitors for defendant: *G. H. King & Franckciss, Portsmouth.*

(1) 10 C. B. (N.S.) 813. (2) [1910] 2 K. B. 531.

F. O. R.

[IN THE COURT OF APPEAL.]

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*July* 27, 28.

## REX *v.* METROPOLITAN POLICE COMMISSIONER. *Ex parte* HOLLOWAY.

*Metropolis — Hackney Carriage — Proprietor — Licence — Application for — Discretion of Commissioner of Police—Metropolitan Public Carriage Act,* 1869 (32 *& 33 Vict. c.* 115), *ss.* 6, 11—*Order of Secretary of State dated December* 30, 1907, *regulations* 1 *and* 4.

The discretion of the Commissioner of the Metropolitan Police in regard to the granting of licences for cabs or stage carriages under the regulations made by the Secretary of State in pursuance of ss. 6 and 11 of the Metropolitan Public Carriage Act, 1869, is not a general discretion to grant or refuse all applications. It is limited to the exceptions contained in clauses (*a*) and (*b*) of regulation 1 of the Order of the Secretary of State dated December 30, 1907.

*Rex* v. *Metropolitan Police Commissioner, Ex parte Pearce,* (1910) 80 L. J. (K.B.) 223; 104 L. T. 135, overruled.

Appeal from a decision of the Divisional Court (Lord Alverstone C.J. and Lawrance J., Darling J. dissenting) discharging a rule nisi which called upon the Commissioner of Police for the Metropolis to shew cause why a mandamus should not issue directing him to grant a licence to the proprietor of a taxi-cab, or to hear and determine the application therefor according to law.

The applicant for the licence, Albert George Holloway, was a motor cab proprietor carrying on business in London. He had six motor cabs, all of which he had acquired under the hire-purchase system from the Chesham Automobile Supply Company, Limited, and two of which had been completely paid for by him. In respect of one of the other cabs all the instalments except the last had been paid, and in respect of the remaining three cabs substantial sums had been paid by way of instalments. The applicant was not in default in respect of the instalments upon any of the cabs.

Proprietors' licences had been granted to the applicant in respect of all his cabs. One of these licences, in respect of a cab for which some instalments were still due, expired in May, 1911, and on May 28 he applied to the Commissioner of Metropolitan Police for a fresh licence. On June 4 he received a letter

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from Sir A. Carmichael Bruce, the Assistant Commissioner, who had control over the Public Carriage Office, refusing to grant the licence.

On December 7, 1910, a Divisional Court (Lord Alverstone C.J. and Pickford and Avory JJ.) held that the Commissioner of the Metropolitan Police had, under the Metropolitan Public Carriage Act, 1869, and the Order dated December 30, 1907, made by the Secretary of State in pursuance thereof, a general unlimited discretion as to the granting of licences for cabs or stage carriages: *Rex* v. *Metropolitan Police Commissioner, Ex parte Pearce.* (1)

On June 15, 1911, in a similar case of *Ex parte Randall* (2) it was held, assuming the Commissioner had an unlimited discretion, that he had not properly exercised it, inasmuch as he had acted upon an arbitrary rule, laid down by himself, that no licence should be granted to an applicant who held his cab under a hire-purchase agreement; and the Court made absolute a rule for a mandamus.

On June 18, in consequence of that decision, Holloway renewed his application for a licence, which was again refused by the Commissioner, and on June 30 he applied for and obtained a rule nisi for a mandamus against the Commissioner. The Court (Lord Alverstone C.J. and Lawrance J., Darling J. dissenting) considered that they were bound by the decision in *Ex parte Pearce* (1) and discharged the rule. From this decision Holloway appealed.

*Sankey, K.C.*, and *R. J. White*, for the appellant. *Ex parte Pearce* (1) was wrongly decided and ought to be overruled. Secondly, the facts of this case shew that the Commissioner had no alternative but to grant the licence, and, thirdly, the Commissioner in refusing the licence has acted upon an arbitrary rule made by himself, and the case is within the authority of *Ex parte Randall.* (2) The question really turns upon ss. 6, 7, and 11 of the Metropolitan Public Carriage Act, 1869 (3), and upon the

(1) 80 L. J. (K.B.) 223; 104 L. T. 135.

(2) (1911) 27 Times L. R. 505.

(3) Sect. 6 provides as follows: "One of Her Majesty's principal Secretaries of State may from time to

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Order dated December 30, 1907, made by the Secretary of State, regulations 1 and 4. (1)

By the Order the Secretary of State has directed the Commissioner to grant licences in a particular way, and it is submitted that he had no other discretion than that which is given to him by regulation 1 (*b*). That is an express mention of a discretion which excludes any other. The Commissioner is bound under regulation 1 (*a*) to refuse a licence to any person under twenty-one years of age. He has a discretion under (*b*) to refuse a licence to any person who has been convicted of felony, misdemeanour, or cruelty to animals, but in every case other than those expressly mentioned exceptions he is bound to grant a licence to an applicant. It cannot be successfully contended that the alteration of the word "shall" in previous Orders into "may" in the Order of 1907 confers upon the Commissioner a general unqualified discretion. If it does so, then the regulation is ultra vires. The decision in *Ex parte Pearce* (2) that the Commissioner has a general discretion to grant or refuse in regard to all applications is wrong. But assuming it to be right,

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time license to ply for hire within the limits of this Act hackney and stage carriages, to be distinguished in such manner as he may by order prescribe. Any licence in respect of a hackney or stage carriage under this section may be granted at such price, on such conditions, be in such form, be subject to revision or suspension in such events, and generally be dealt with in such manner as the said Secretary of State may by order prescribe, subject as follows: . . . ."

Sect. 11 provides that "Any licence grantable by a Secretary of State under this Act may, if the said Secretary of State so direct, be granted by the Commissioner of the Metropolitan Police, or by such other person as the said Secretary of State appoints for the purpose."

(1) Regulation 1 provides that "A licence for a cab or stage carriage may be granted to any person by the Commissioner of Police of the Metropolis, hereinafter referred to as the Commissioner, subject to the following exceptions:—(*a*) A licence shall not be granted to any person under the age of twenty-one years, and any licence so granted shall be void. (*b*) The Commissioner may at his discretion refuse a licence to any person who has been convicted of a felony, misdemeanour, or of cruelty to animals, or who, having previously held a licence for a cab or a stage carriage, has had such previous licence revoked or suspended."

Regulation 4 provides: "If the application is approved by the Commissioner, the applicant shall pay the said sum of 2*l*."

(2) 80 L. J. (K.B.) 223.

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this case cannot be distinguished from *Ex parte Randall* (1), and the rule for a mandamus ought to be made absolute.

*Danckwerts, K.C.*, and *G. A. Scott*, for the respondent. The Commissioner of the Metropolitan Police has a perfectly general discretion under the Act of 1869 and the Order thereunder with regard to the granting of these licences: *Ex parte Pearce.* (2)

Before the passing of the Metropolitan Public Carriage Act, 1869, hackney carriages were licensed under the Act 1 & 2 Will. 4, c. 22, and subsequent Acts, the object of which was the raising of revenue, and under those Acts the licensing was unlimited. A new system was introduced by the Act of 1869 under which the licensing of cabs was placed under police supervision. The power given by s. 6 to the Secretary of State is purely permissive. Under s. 11 the Secretary of State could only delegate the discretion which he himself had. The Commissioner of Police has an unlimited discretion in the matter. He is not bound to grant a licence to any one who is a proprietor within the Act of 1843. The terms of the Order of December 30, 1907, are permissive. The words are that a licence "may" be granted to any person subject to certain exceptions. It lies upon those who call for the exercise of the power to shew that there is an obligation to exercise it: *Julius* v. *Bishop of Oxford.* (3) The House of Lords in that case deals with various considerations which affect the Court in deciding whether the donee of a power of this kind is to be treated as being under an obligation to put it in force or as having a discretion in the matter. The words under discussion in that case were "it shall be lawful," and they were held to give complete discretion.

[COZENS-HARDY M.R. referred to *Alderman Backwell's Case.* (4)]

Applying the reasoning of the judgments in *Julius* v. *Bishop of Oxford* (3) to the present case in order to enable the Court to construe "may" as "must," regard must be had to the context and to the rights of the applicant and the duties of the official. It is not expressly provided that an applicant has any absolute legal right to a licence, and unless the case comes within

(1) 27 Times L. R. 505.
(2) 80 L. J. (K.B.) 223.
(3) (1880) 5 App. Cas. 214.
(4) (1683) 1 Vern. 152.

exception (*a*) of regulation 1 the Commissioner has an absolute discretion in the matter. In previous Orders made under the Act the word "shall" was used instead of "may." Regulation 4 of the Order provides for the payment of a fee for the licence "if the application is approved." That clearly implies a discretion in the Commissioner.

If the duty of the Commissioner is merely ministerial, then subject to the exceptions expressly mentioned in the Order the licences must go as a matter of course. That could not have been intended by the Legislature. The Secretary of State under s. 6 of the Act of 1869 prescribes the terms and conditions of the licence, but subject to that the general power to grant licences is still preserved in s. 11, and the general discretion is preserved throughout. If that be not so, then any member of the public outside the exceptions (*a*) and (*b*), irrespective of his character or financial stability, will be entitled as of right to require the Commissioner to approve his application for a licence. It is to be inferred from the alteration in the wording of the Order that the Commissioner should exercise the full discretionary power of the Secretary of State. The Act imposes upon a cab proprietor certain responsible duties both as to the driver, of whose licence he is to have the custody, and as to the condition of the cabs; and the Commissioner of Police has authority over these public duties. The question is whether the Court has power to review the exercise of the Commissioner's discretion with reference to the class of persons who ought to be in the position of licensed cab proprietors in London. If the Court should be of opinion that the function of the Commissioner is merely ministerial he will be relieved of an irksome duty in the performance of which he has hitherto exercised, in the interests of the public, a discretion which he believed he possessed.

COZENS-HARDY M.R. This is an appeal from an order of the Divisional Court discharging an order nisi for a writ of mandamus directed to the Commissioner of Police of the Metropolis, commanding him to grant a cab licence to the appellant. The grounds alleged are, first, that the Commissioner had not a general discretion to grant or refuse a licence; secondly, that in so far

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as the Order of 1907, under which the Commissioner acts, purports to give an absolute discretion to the Commissioner of Police, it is ultra vires; and thirdly, that the making by the Commissioner of Police of a rule against the granting of licences to proprietors in respect of cabs held by them under hire-purchase agreements is ultra vires. The Divisional Court, being bound by the decision in *Ex parte Pearce* (1), did not deal with the first of these grounds, and by a majority declined to grant a mandamus on the third ground. The whole matter is open in this Court, and as I have arrived at the conclusion that the appeal ought to succeed on the first ground, I do not propose to deal with the other grounds.

Now Holloway is the possessor of several cabs, of some of which he is the absolute owner. The particular cab in question he holds under a hire-purchase agreement in respect of which he is clearly not in arrear. He is a proprietor within the definition in the Act of 1843. Licences are granted under the provisions of the Act of 1869. By s. 6 of that Act "One of Her Majesty's principal Secretaries of State may from time to time license to ply for hire within the limits of this Act hackney and stage carriages, to be distinguished in such manner as he may by order prescribe." Then "Any licence in respect of a hackney or stage carriage under this section may be granted at such price, on such conditions, be in such form, be subject to revision or suspension in such events, and generally be dealt with in such manner as the said Secretary of State may by order prescribe." That is subject to certain conditions to which I need not refer.

Then it was seen by the Legislature, as appears by s. 11, that this was rather an irksome duty necessarily to impose upon the Secretary of State, for by clause 11 it provides that any licence grantable by a Secretary of State under this Act may, if the Secretary of State so direct, be granted by the Commissioner of the Metropolitan Police, or by such other person as the said Secretary of State appoints for the purpose.

Now licences have been granted to cab proprietors certainly since the early part of last century. I think the first Act called to our attention was the Act of 1831. It is common knowledge

(1) 80 L. J. (K.B.) 223; 104 L. T. 135.

that the number of cabs in the metropolitan district is enormous. I am told it is about 17,000. To suppose that the Legislature intended to leave it absolutely in the discretion of the Home Secretary summarily to put an end to the occupation of all these cab proprietors and cabdrivers is, to say the least, rather startling.

In December, 1907, an Order was made, in substitution of various prior Orders made from time to time by the Secretary of State, and so far as it is material it is in these words: "In pursuance of sections 6 and 11 of the Metropolitan Public Carriage Act, 1869, I hereby prescribe as follows:—A licence for a cab or a stage carriage may be granted to any person by the Commissioner of Police of the Metropolis, hereinafter referred to as the Commissioner, subject to the following exceptions:—(*a*) A licence shall not be granted to any person under the age of twenty-one years, and any licence so granted shall be void. (*b*) The Commissioner may at his discretion refuse a licence to any person who has been convicted of a felony, misdemeanour, or of cruelty to animals, or who, having previously held a licence for a cab or a stage carriage, has had such previous licence revoked or suspended." I pause there to say that it is proved that Holloway does not come within either of the exceptions (*a*) or (*b*).

Now the Commissioner of Police has a limited authority given to him by the Secretary of State. He is told that in one case, namely (*a*), he must not grant a licence; and in certain other cases, (*b*), he may at his discretion refuse. The maxim "Expressio unius" seems to apply. A wide general discretion to refuse is really inconsistent with and negatived by sub-clause (*b*). I agree with, and desire to adopt, the dicta of Lush J. in *Randall's Case* (1) where he says (3): "If it had not been for the decision in *Ex parte Pearce* (2) I confess I should have felt some hesitation in coming to the conclusion that the Commissioner of Police has the very wide discretion which Mr. Scott says he has. He derives his power to grant or withhold licences entirely from the mandate given to

(1) 27 Times L. R. 505.
(2) 80 L. J. (K.B.) 223; 104 L. T. 135.
(3) The Master of the Rolls read from a shorthand note of the judgment.

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him by the Secretary of State, who obtains his power to give such mandate from s. 11 of the Metropolitan Public Carriage Act, 1869. It may be observed that the Commissioner in the regulations which have been laid down by the Secretary of State, and upon which the Commissioner acts, is told by clause 1, sub-paragraph (*b*), that he may, in certain specified instances in his discretion, refuse a licence. It does seem to me that there might have been considerable force in the contention that it is an erroneous view to take of that sub-paragraph to say that it means that the Commissioner may in his discretion if he thinks fit refuse a licence." And then he goes on to say that in *Ex parte Pearce* (1) the contrary was held.

Now I have carefully considered with the respect which is due to the learned judges who decided *Ex parte Pearce* (1) whether that can really be considered a sound decision. The point is obviously one of difficulty. The Lord Chief Justice begins his judgment by saying that the case is by no means free from difficulty. He goes through the Act and, without saying that he thinks sub-clause (*b*), to which I have referred, is retained or put there per incuriam, he seems to take the view that it really does not confine or limit the discretion which he finds elsewhere in the Act and in the rules. But he does not, as far as I can make out, condescend upon any particular passage in either the Act or the rules which gives the Commissioner an absolute discretion in the sense in which those words are used. Pickford J. says—and there is great force in this, if it were well founded—that the Commissioner of Police is substituted for the Secretary of State and must have the same discretion and the same powers as the Secretary of State. With the greatest possible respect that is a proposition to which I cannot assent. It is too plain for argument that the Commissioner cannot make new regulations. He can only act to the extent and for the limited purposes mentioned or prescribed, to use the words of the Secretary of State himself, in the Order which I have read.

But then it has been said that the word used in the Order is not "shall," but "may." We have had our attention called, and not for the first time, to *Julius* v. *Bishop of Oxford* (2), and it

(1) 80 L. J. (K.B.) 223; 104 L. T. 135. (2) 5 App. Cas. 214.

seems to me it is impossible to read this Act of Parliament, dealing with an existing well-known numerous class of traders in the city of London, and to say that this is not a case in which there is a duty imposed to grant the licence subject to the express conditions imposed by the Secretary of State in the mandate which has been conferred upon the Commissioner of Police.

For these reasons I think *Ex parte Pearce* (1) is a case which ought not to be followed. I think the Commissioner has not the absolute discretion which he claims. It is not disputed that the case does not fall within sub-clauses (*a*) or (*b*), and that being so, I think the mandamus ought to go with the usual consequences here and below.

FARWELL L.J. I am of the same opinion. Sect. 6 of the Act of 1869 imposes two duties on the Secretary of State. The first duty is to grant licences, and the Act makes it penal to use an unlicensed hackney carriage; to say that the Secretary of State may take all hackney carriages off the streets by refusing to license any seems to me extravagant. He has, therefore, a duty to license. He has a second duty, namely, to promulgate an Order stating the conditions subject to which the licences are to be granted. Now that is a duty which is distinct from granting licences. Having made the Order he is as much bound by it as any delegate of his in the shape of a Commissioner of Police. The Secretary of State having published the Order stating the conditions on which licences shall be granted has, in my opinion, no discretion left by which he can refuse on any other ground to grant such a licence. Then s. 11 gives the Secretary of State this power: "Any licence grantable by a Secretary of State under this Act may, if the said Secretary of State so direct, be granted by the Commissioner of the Metropolitan Police, or by such other person as the said Secretary of State appoints for the purpose."

That refers to the power of granting the licences; not to the power of making the Order stating the conditions under which the licence is to be granted. The Commissioner gets no more discretion than the Secretary of State himself has, which is to

(1) 80 L. J. (K.B.) 223; 104 L. T. 135.

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grant licences in accordance with the existing Order. Then the Commissioner exercising that power must exercise it in accordance with the conditions which are stated in it. I turn now to the actual Order itself; the first section runs in this way: "A licence for a cab or a stage carriage may be granted to any person by the Commissioner of Police of the Metropolis . . . . subject to the following exceptions." Now that is a perfectly general statement as regards every one. All persons may desire to have licences to possess and use hackney carriages. The exceptions—absolute exceptions—are, first, of all persons under twenty-one, and, secondly, by sub-clause (*b*) the Commissioner may at his discretion refuse a licence to certain specified persons. When an Act provides that the licence may be granted to anybody except A., and (if the Commissioner shall think fit in the exercise of his discretion) a class X., any other refusal is necessarily excluded. The statement by way of exception shews that the power is general except so far as the exception extends to take something out of it, and the exception has taken a particular class out. Beyond that it has taken nothing, and therefore the whole of the rest of the world is entitled to apply for and obtain licences unless and until the Secretary of State shall promulgate a fresh Order. Any other construction would allow the Secretary of State to debar mero motu any one of whom he disapproved from exercising the general common law right of using the street.

When the statute has forbidden anybody but a licensed proprietor of a hackney coach to put on, or to use or ply for hire with a carriage on, the streets, it necessarily implies that all parties shall be treated fairly and alike unless and until the Secretary of State, to whom is committed the duty, shall make provisions applicable to all alike, saying that such and such classes of persons shall be refused. To say that either the Secretary of State or the Commissioner may refuse to license, not a class of persons, but an individual, because, as in the present case, he thinks he has not got money enough, seems to me to be an interference with the rights and liberties of the public as a body which I cannot find justified by anything in the Act. I think Mr. Scott has quite failed to distinguish *Julius* v. *Bishop of Oxford.* (1)

(1) 5 App. Cas. 214.

I think both the passage in Lord Cairns' judgment on p. 225, which has been already read, and the passage in Lord Penzance's judgment on p. 231 and on the top of p. 232 apply to this present case, and shew that the word "may" here must be read "shall" in order to give effect to the rights of the public which are interfered with only to the extent necessary to carry out the Act, and that portion of the Act in particular which is dealt with by the Secretary of State's Order and nothing beyond.

I therefore agree, with the greatest respect to the Divisional Court, that the decision in *Ex parte Pearce* (1) cannot stand, and I confess that I fail to follow the meaning of the passage in Pickford J.'s judgment where he doubts whether the Secretary of State by his Order and regulations made in pursuance of s. 6 could or could not fetter the discretion of the Commissioner. I think there must be some mistake in the report. I think this appeal must be allowed.

KENNEDY L.J. I am of the same opinion. It seems to me that upon the grounds which have already been stated *Ex parte Pearce* (1) was wrongly decided.

I cannot help thinking, with great respect, that the Lord Chief Justice was influenced by an idea, for which I can find no foundation, that an inquiry was to be made into the degree of ownership which the applicant had in the vehicle. He says according to the report at 104 L. T., p. 139: "I merely say that in my opinion it is not an improper exercise of discretion to come to the conclusion that the man was not the bona fide owner of the cab for which he was asking for a licence." Proprietorship is not ownership. Proprietorship as defined by the statute is practically such interest in and such dominion over the vehicle either alone or with others concerned in the working of the vehicle as makes the man anxious to obtain a licence for its working. Further, as my colleagues have said, by the terms of the delegation or, to use the word of the Order of the Secretary of State, prescription, there is no discretion given except to the extent to which the discretion is expressed in the clauses which have been referred to, and I disagree with

(1) 80 L. J. (K.B.) 223, 228; 104 L. T. 135, 139.

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the view, if it be correctly reported, expressed by Pickford J. that prima facie the Commissioner, being substituted for the Secretary of State, must necessarily have the same discretion as the Secretary of State had. In my opinion no such substitution is to be found in the statute.

I will only add that the contention now set up that it is necessary to inquire into the financial position of an applicant, such as whether his cabs have been wholly paid for or not, and matters of that kind, is certainly not, in my opinion, justified by anything in the statutes. In a book authorised by the Secretary of State [1] it is said that a hackney carriage licence or stage carriage licence will be granted by the Commissioner to any person who is not barred by the two express provisions, one absolute and the other qualified, which are expressed in the Order of the Secretary of State.

It is difficult to see how it can be successfully argued that the use of the word "may" in the Order implies anything more than a duty to be performed under and subject only to the express provisions which are contained in the Order.

I agree that the appeal must be allowed.

*Appeal allowed and rule made absolute.*

Solicitor for appellant: *Julius A. White.*

Solicitors for respondent: *Wynne & Sons.*

[1] Abstract of Laws relating to Proprietors of Public Carriages within the Metropolitan Public Carriage District.

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.
1911
*Nov.* 3.

## LONDON, GLOUCESTERSHIRE, AND NORTH HANTS DAIRY COMPANY *v.* MORLEY & LANCELEY.

*London—Building—Party Wall—External Wall—Wall a Party Wall for Portion of its Height—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss. 5*, 58.

APPEAL from the judgment of a Divisional Court (Phillimore J. and Bankes J.) on an appeal from a county court. (1)

*Danckwerts, K.C.*, and *Heber Hart*, for the appellants.
*Hudson, K.C.*, and *R. J. Willis*, for the respondents.

After the arguments on the appeal had proceeded for a considerable time, the parties arrived at a settlement in respect of the matters involved in the case, and consequently no judgment was given upon the questions of law raised by the appeal.

*Case settled.*

Solicitors for appellants: *Cattarns & Cattarns.*
Solicitor for respondents: *Lewis W. Taylor.*

(1) Reported ante, p. 257.

E. L.

1911
*July* 29;
*Aug.* 18.

[COURT OF CRIMINAL APPEAL.]

## THE KING *v.* MACHARDY.

*Criminal Law—Appeal—Conviction—Special Verdict—Guilty but Insane at Time he did Act charged—Right of Appeal—Trial of Lunatics Act*, 1883 (46 & 47 *Vict. c.* 38), *s.* 2—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3.

Where upon the trial of an indictment a special verdict is returned under s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, that the accused was guilty of the act or omission charged against him, but was insane so as not to be responsible according to law for his actions at the time when he did the act or made the omission, and an order for his detention is thereupon made under s. 2, sub-s. 2, of the Act, the accused is "a person convicted on indictment" within the meaning of s. 3 of the Criminal Appeal Act, 1907, the finding that the accused was guilty of the act or omission charged against him being a conviction, and therefore he has a right of appeal against the conviction.

*Rex* v. *Ireland*, [1910] 1 K. B. 654, approved.

The conviction, however, does not include that part of the finding that the accused was insane at the time when he did the act or made the omission charged against him, such finding being in relief of the accused, and therefore no appeal lies from that part of the verdict.

Appeal against conviction.

The appellant was indicted at the Lancashire Assizes before Lush J., under s. 2 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), for having on June 24, 1911, feloniously, unlawfully, and maliciously set fire to a dwelling-house, certain persons being at the time therein.

During the course of the case for the prosecution it was elicited by the learned judge from one of the witnesses that the appellant had been under medical care in an asylum for ten months with regard to his mental condition, and that he came out of the asylum in November, 1907. The defence of insanity was not raised or relied upon in any way by or on behalf of the appellant, and the learned judge, in his summing up, told the jury that there was, in his opinion, no evidence to justify them in finding, under s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, that the appellant was insane at the time. The jury, however, found that the appellant was guilty of the act charged against him, but

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was insane so as not to be responsible, according to law, for his actions at the time when he did the act, and the learned judge ordered him to be detained in custody as a criminal lunatic until His Majesty's pleasure should be known. (1) The appellant, in his notice of appeal against the conviction, stated as the grounds of appeal, first, that there was not sufficient evidence that he set fire to the house, and, secondly, that there was no evidence that he was insane at the time of the fire.

The appeal was first argued before a Court composed of three judges (Lord Alverstone C.J., Pickford and Avory JJ.), when it was contended on behalf of the appellant that upon one or both of the grounds stated in the notice of appeal the conviction should be quashed. The Court, after hearing the arguments, stated that they desired the case to be re-argued before a Court consisting of five judges, the questions upon which they desired further argument being (1.) whether the case of *Rex* v. *Ireland* (2) was rightly decided; and (2.) whether, assuming that case to have been rightly decided, there was any appeal against that part of the special verdict which found that the appellant was insane at the time when he did the act.

The case was accordingly re-argued before Lord Alverstone C.J., Lawrance, Phillimore, Pickford, and Hamilton JJ.

July 29. *A. H. Bodkin* and *J. McKeever*, for the appellant. The first question is whether a person against whom a special

(1) Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), s. 2:

"(1.) Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane so as not to be responsible according to law for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.

"(2.) Where such special verdict is found, the Court shall order the accused to be kept in custody as a criminal lunatic in such place and in such manner as the Court shall direct till Her Majesty's pleasure shall be known . . . ."

(2) [1910] 1 K. B. 654.

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verdict has been returned under s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, and who has thereupon been ordered to be detained under sub-s. 2 as a criminal lunatic until His Majesty's pleasure shall be known, is "a person convicted on indictment" within the meaning of s. 3 of the Criminal Appeal Act, 1907, and as such can appeal against his conviction. In *Rex* v. *Ireland* (1) that question was decided in the affirmative. That case is exactly in point and is good law and ought to be followed. Sect. 3 of the Act is intended to include every case of a verdict of a jury adverse to a prisoner who is being tried on indictment so as to provide a means of remedying any miscarriage of justice arising from the verdict. "Conviction" may mean either the verdict and the judgment thereon or merely the verdict. In ss. 1 and 2 of the Crown Cases Act, 1848 (11 & 12 Vict. c. 78), "conviction" is contrasted with the "judgment on such conviction." So also in s. 3 of the Criminal Appeal Act, 1907, "conviction" is contrasted with "sentence." The verdict of the jury is therefore the conviction, and against that conviction an appeal lies. If on the other hand an accused person has, before being put upon his trial on the indictment, been found by a jury to be insane and unable to plead and take his trial, he is not a person "convicted on indictment," and no appeal lies: *Rex* v. *Larkins*. (2)

The verdict of the jury, including the finding of insanity, is one entire verdict and cannot be split into two parts. The verdict as a whole must be looked at, and if there is no evidence to support that part of the verdict finding insanity, the Court must quash the conviction. Before 1800 in case of insanity the jury found either a special verdict, or a general verdict of acquittal, and in either case the accused went free. Under s. 1 of the Criminal Lunatics Act, 1800 (39 & 40 Geo. 3, c. 94), if the jury found that the accused was insane at the time of committing the offence they returned a verdict of acquittal on the ground of insanity, and he was ordered to be detained until His Majesty's pleasure should be known. That section has been repealed by s. 4 of the Trial of Lunatics Act, 1883, and by s. 2 of this latter Act the jury in such a case now return a verdict that the

(1) [1910] 1 K. B. 654. (2) (1911) 105 L. T. 384; 75 J. P. 320.

accused is guilty of the act or omission charged, but was insane at the time when he did the act or made the omission. The verdict, though in a different form, is still one entire verdict. The section draws a distinction between the "offence" and "the act or omission" charged. The offence includes all the elements necessary in law to constitute the offence. In the present case the offence charged is founded upon s. 2 of the Malicious Damage Act, 1861, which makes it a felony for a person "unlawfully and maliciously" to set fire to a dwelling-house, any person being therein. By s. 58 every punishment by that Act imposed on any person maliciously committing any offence "shall equally apply and be enforced whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise." Malice is therefore an essential element in the offence. The offence consists in doing the act with a malicious mind. The mere doing of the act is not sufficient to create the offence. The jury must be taken to have found that the appellant, from disease of the mind, either did not know the nature and quality of the act he was doing when he set fire to the house, or, if he did know it, that he did not know that the act was wrong. That finding negatives malice. Malice "means any wicked or mischievous intention of the mind": per Best J. in *Rex* v. *Harvey*. (1) Malice in its legal sense means "a wrongful act, done intentionally, without just cause or excuse": *Bromage* v. *Prosser* (2); *M'Pherson* v. *Daniels*. (3) In Foster's Crown Law, 3rd ed., p. 257, speaking of the words "malice" and "maliciously" as used in a certain Act, it is stated that the term "plainly importeth in general a wicked, perverse, and incorrigible disposition"; and this passage was cited with approval by Mellor J. in *Reg.* v. *Ward*. (4) See also *Reg.* v. *Pembliton*. (5) A person found to be insane cannot have a malicious mind, and the verdict of the jury that the appellant was guilty of the act charged merely means that he in fact set fire to the house. They did not find him guilty of

(1) (1823) 2 B. & C. 257, at p. 268.
(2) (1825) 4 B. & C. 247, at p. 255.
(3) (1829) 10 B. & C. 263, at p. 272.
(4) (1872) L. R. 1 C. C. R. 356, at p. 361.
(5) (1874) L. R. 2 C. C. R. 119.

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the offence. There must be mens rea to constitute the offence. "The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition": per Stephen J. in *Reg.* v. *Tolson.* (1) It is like the case of a child between the age of seven and fourteen, who is presumed not to have sufficient capacity to know right from wrong: *Rex* v. *Owen.* (2) The verdict is rather loosely described as a special verdict. It is really a statutory verdict equivalent to one of not guilty of the offence charged. The case of *Reg.* v. *Dudley* (3) affords an instance of a special verdict in the proper sense of the term. The jury have not found the appellant guilty of the offence charged against him, and, as there is no evidence to support the finding of insanity, the Court must, under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, set aside the verdict and discharge the appellant. The Court cannot dismiss the appeal under the proviso to that sub-section upon the ground that, though the finding as to insanity is not supported by the evidence, no substantial miscarriage of justice has actually occurred. Detention in a criminal lunatic asylum is very different from a term of imprisonment. Nor has the Court power to act under s. 5 of the Act. The Court has no power in such a case to pass a sentence of imprisonment instead of the order for detention as a criminal lunatic, the jury not having found that the appellant was guilty of the offence charged against him; nor has the Home Secretary any power to remit to a prison for punishment a person who has been found guilty but insane, and afterwards becomes or has been throughout sane.

[LORD ALVERSTONE C.J. We have heard from the Home Secretary, and he does not claim to have any such power.]

Under s. 2 of the Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), the Home Secretary has power to order a prisoner who is insane to be removed to an asylum and there detained as

(1) (1889) 23 Q. B. D. 168, at p. 187. (2) (1830) 4 C. & P. 236.
(3) (1884) 14 Q. B. D. 273.

a criminal lunatic, and by s. 3, when a criminal lunatic (other than a person with respect to whom a special verdict under s. 2 of the Trial of Lunatics Act, 1883, has been found) becomes sane, the Home Secretary may direct such person to be remitted to prison. That, however, does not affect this case. The Court must therefore allow the appeal and quash the conviction.

*A. J. Laurie*, for the prosecution. No appeal lies in this case. There has not been a "conviction" of the appellant within the meaning of s. 3 of the Criminal Appeal Act, 1907. The special verdict prescribed by s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, does not amount to a conviction of the crime charged. The enactment twice uses the word "offence," and then goes on to provide that if it appears to the jury that the accused was insane at the time when he did the act or made the omission charged, they shall return a special verdict that he was guilty, not of the offence, but of the act or omission charged against him, and that he was insane at the time. From 1800 down to the Act of 1883 the verdict in such a case would have been not guilty on the ground of insanity, and the order of the Court would have been the same as that under s. 2, sub-s. 2, of the Act of 1883. There is nothing in the Act of 1883 which changes the law upon the point; the only alteration is in the form of the verdict. That verdict does not amount to a conviction within the meaning of s. 3 of the Criminal Appeal Act, 1907. The sentence is one fixed by law, s. 2, sub-s. 2, of the Act of 1883 giving the judge no discretion as to the order he shall make, and therefore by s. 3 (*c*) of the Criminal Appeal Act, 1907, no appeal can lie against the sentence. The decision in *Rex* v. *Ireland* (1) is wrong and ought not to be followed. Even assuming that it can be said that the special verdict under s. 2, sub-s. 1, of the Act of 1883 can be called a conviction, it is not so for all purposes. For instance, under s. 10 of the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), a person who has been three times previously convicted of a crime is liable to be treated, on a subsequent conviction on indictment for a crime, as a habitual criminal and sentenced to a term of preventive detention. It is impossible to suppose that a conviction as a

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criminal lunatic would be a conviction within that Act. It is not a conviction for the purposes of that Act, nor is it a conviction for the purposes of the Criminal Appeal Act, 1907.

Next, assuming that the decision in *Rex* v. *Ireland* (1) is right, the accused can only appeal against that part of the verdict which says that he was guilty of the act or omission charged against him. He cannot appeal against the finding of insanity. Sect. 5 of the Criminal Appeal Act, 1907, contains special provisions enabling the Court to vary a verdict and sentence, and no other case besides those specified can be brought within the Act. There is nothing in that section which empowers the Court to touch the finding as to insanity. The Court can only deal with the finding that the accused did the act or made the omission charged. Sect. 5, sub-s. 4, gives power to the Court, if it thinks that, though the appellant was guilty of the act or omission charged against him, he was insane at the time, to quash the sentence passed at the trial and to order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883, in the same manner as if a special verdict had been found by the jury under that Act. The section does not give the Court power to reverse a finding of insanity under the Act of 1883; and r. 4 (*d*) of the Criminal Appeal Rules, 1908, is necessary for the purpose of enabling notice of appeal to be given by a person who desires to appeal and with reference to whom it was contended at the trial that he was insane at the time the act was done. It cannot have been intended that the Court, having come to the conclusion that the finding that the appellant was guilty of the act charged against him was right, should let him go free because it comes to the conclusion that he was sane at the time he did the act.

*Cur. adv. vult.*

Aug. 18. The judgment of the COURT was read by

LORD ALVERSTONE C.J. In the opinion of the majority of the Court this appeal should be dismissed.

The appellant was indicted on a charge of arson under s. 2 of

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24 & 25 Vict. c. 97. The jury found a verdict, in accordance with the Trial of Lunatics Act, 1883, that the appellant was guilty but insane at the time so as not to be responsible according to law. In the case of *Rex* v. *Ireland* (1) this Court decided that an appeal can be brought under the Criminal Appeal Act, 1907, against such a verdict. Argument was addressed on behalf of the Crown to the question whether this decision was correct. In the opinion of the Court it was. The appellant was "convicted on indictment" within the meaning of s. 3 of the Criminal Appeal Act, 1907, the finding of the jury that he was guilty of the act charged against him being a "conviction." The appellant is detained under an order following that verdict, and if the view taken in *Rex* v. *Ireland* (1) is not correct, although the finding of the jury as to the guilt of the appellant might have been the result of the admission of improper evidence or of gross misdirection, there would be no appeal.

The Court has now to consider whether, assuming *Rex* v. *Ireland* (1) to be correctly decided, an appeal lies against the finding of the jury that the appellant was insane, and whether in fact that part of the finding is a part of the conviction against which an appeal lies. In the opinion of the Court it is not. It is a finding of the jury in aid of the prisoner and in his relief. Under the statute they found him guilty of the act or omission charged against him, but that he was insane when he did the act or made the omission. It is doubtful whether it can be successfully contended that the finding negatives any essential ingredient of the offence; but, even assuming that it does, it is not, in the opinion of the Court, a part of the conviction, but a special verdict of the jury in relief of the prisoner. In the opinion of the Court this view is supported by s. 5, sub-s. 4, of the Criminal Appeal Act, 1907, which allows the Court, in the case of a person convicted and sentenced in the ordinary way, to find that he was insane and to make an order under the Trial of Lunatics Act, 1883. The detention of the prisoner under the Act of 1883 is not a part of the conviction, but is the result of a statutory provision as to how a person found insane by such a special verdict shall be dealt with.

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For these reasons the Court is of opinion that there is no appeal against the part of a special verdict under the Act of 1883 which finds the prisoner to be insane.

*Appeal dismissed.*

Solicitor for appellant and prosecution: *Director of Public Prosecutions.*

W. F. B.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 2, 1911, will be as follows:—

In the First Series,
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In the Second Series,
[1911] 1 K. B. [1911] 2 K. B. [1911] P.

In the Third Series,
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*See* under EMPLOYER AND WORKMAN.

**ACCORD AND SATISFACTION**—*Sum offered by a Third Party in Satisfaction of a Debt—Effect of Acceptance by Creditor—Extinction of Debt.*

Where the father of a debtor wrote to the creditor, offering an amount less than that of the debt in full settlement of the debt, and enclosing a draft for that amount, and the creditor cashed and retained the proceeds of the draft, and afterwards brought an action against the debtor for the balance of the debt:—

*Held*, that the creditor must be taken to have accepted the amount received by him on the terms upon which it was offered, and, therefore, he could not maintain the action.

*Goddard* v. *O'Brien* (1882) 9 Q. B. D. 37, questioned.

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**ADULTERATION** — *Fertilisers and Feeding Stuffs—Offence—Article sent to Purchaser in Ireland—Prosecution in England by Department of Agriculture and Technical Instruction for Ireland—Necessity for Consent of Board of Agriculture—Fertilisers and Feeding Stuffs Act*, 1906 (6 *Edw.* 7, *c.* 27), *ss.* 6, 12.

By s. 1, sub-s. 2, of the Fertilisers and Feeding Stuffs Act, 1906, a person who sells for use as food for cattle any article which has been artificially prepared shall give to the purchaser an invoice containing certain particulars. By s. 6, sub-s. 1 (*a*), if he fails without reasonable excuse to give the invoice required by the Act, he shall be liable to a fine; and by sub-s. 3, "a prosecution for an offence under this section shall not be instituted except with the consent of

**ADULTERATION**—*continued.*

the Board of Agriculture and Fisheries, and the Board shall not give such consent until the part of the sample retained by the agricultural analyst has been analysed, and a certificate of analysis given, by the chief analyst." By s. 12, "For the purposes of the execution of this Act in Ireland . . . . the Department of Agriculture and Technical Instruction for Ireland shall be substituted for the Board of Agriculture and Fisheries . . . . and for the purpose of instituting prosecutions the said Department may take samples of any articles to which this Act applies which have been sold or are kept or exposed for sale."

The respondents in England sent to a purchaser in Ireland an article as food for cattle, and were prosecuted in England by the Department of Agriculture and Technical Instruction for Ireland, which had taken a sample of the article in Ireland and had it analysed there, for having failed without reasonable excuse to give to the purchaser an invoice as required by the Act. The consent of the Board of Agriculture and Fisheries to the institution of the prosecution had not been obtained:—

*Held*, that the consent of the Irish Department to the institution of the prosecution was not sufficient, but that the consent of the Board of Agriculture and Fisheries was necessary. HILL *v.* PHŒNIX VETERINARY SUPPLIES, LIMITED
**Div. Ct. 217**

2. —— *Limit of Time for taking Proceedings—Continuing Warranty—Subsequent Delivery—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 20—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 20, *sub-s.* 6.

On August 9, 1910, the appellants, a firm of wholesale milk dealers, agreed to supply to a firm of retailers all the milk which they might require at one of their branches, and on the same date the appellants gave a written warranty as to the quality of all the milk which might thereafter be supplied by them to the retailers. On January 17, 1911, the appellants supplied milk under the contract which was not in accordance with the warranty, and on February 15, 1911, an information was laid charging the

**ADULTERATION**—*continued.*
appellants with an offence under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899 :—
*Held*, that the six months within which the information had to be laid ran from January 17, 1911, and that the proceedings were, therefore, commenced in time. THOMAS, LIMITED *v.* HOUGHTON - - - - - **Div. Ct. 959**

3. —— *Sale by Corporation — "Person" — False Warranty — Reason to believe—Sale of Food and Drugs Act*, 1899 (62 *&* 63 *Vict. c.* 51), *s.* 20, *sub-s.* 6.
By s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, it is enacted that every person who, in respect of an article of food or drug sold by him, gives to the purchaser a false warranty in writing, shall be liable on summary conviction to a fine as therein mentioned, unless he proves that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true :—
*Held*, that a joint stock company incorporated under the Companies Acts can be convicted of an offence under the above enactment. CHUTER *v.* FREETH & POCOCK, LIMITED - **Div. Ct. 832**

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**BAILIFF**—County court—"Travelling to execute warrant"—Mileage - - - **309**
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**BAILMENT** — *Warehouseman — Negligence — Claim by Third Party to Goods bailed—Duty of Bailee — Notice of Claim to Bailor — Order by Magistrate that Goods be delivered to Third Party — Effect of — Metropolitan Police Courts Act*, 1839 (2 *&* 3 *Vict. c.* 71), *s.* 40.

The plaintiff, a married woman living apart from her husband, deposited certain goods belonging to her with the defendant, a warehouseman, the charge to be made by the defendant for the storage of the goods being agreed between the plaintiff and the defendant. The plaintiff gave her address to the defendant. The plaintiff's husband subsequently went to the defendant's premises and claimed to be the owner of the goods, and, upon the defendant refusing to deliver them to him except under a magistrate's order, the husband and a representative of the defendant attended before a magistrate. The defendant's representative informed the magistrate that the goods had been deposited with the defendant by the plaintiff and that therefore the defendant for his protection required an order of the magistrate that he should deliver the goods to the husband. Thereupon a summons was issued by the magistrate under s. 40 of the Metropolitan Police Courts Act, 1839, against the defendant. The defendant did not give notice to the plaintiff of the husband's claim to the goods or of the issue of the summons. At the hearing of the summons the husband swore that he was the owner of the goods and that they were worth 10*l.*, and the magistrate thereupon made an order that the defendant should deliver the goods to the husband. The defendant accordingly delivered the goods to the husband, and the next day wrote to the plaintiff informing her that the goods had been removed by order of a magistrate. The plaintiff subsequently brought an action in the county court claiming from the defendant the return of the goods or their value and damages for their detention, and the county court judge directed the jury that the defendant would be responsible for the loss of the goods if he by his negligence allowed the magistrate's order to be made without giving notice to the plaintiff, whose address he knew, of her husband's claim to the goods or asking the magistrate to summon the plaintiff before him so that she might be heard. The jury found that there was negligence on the part of the defendant :—

**BAILMENT**—*continued.*

*Held* (reversing the decision of a Divisional Court, [1911] 1 K. B. 499), that there had been a failure on the part of the defendant to fulfil his obligations as a bailee, and that he could not rely for protection upon the order made by the magistrate, and therefore the plaintiff was entitled to judgment. RANSON *v.* PLATT
**C. A. 291**

**BANK.**

*See* under BANKER.

**BANKER** — *Account opened by Principal in Name of Agent—Revocation of Agent's Authority to draw on Account—Liability of Banker to pay undrawn Balance to Principal.*

*Semble*, per Scrutton J., that a principal who pays money into a bank to the account of a person known to the bank to be his agent upon the terms that the agent shall have authority to draw upon the account has the power, if he rightly determines the agency and revokes the authority of the agent to draw upon the account, to require the bank to return any undrawn balance to him. SOCIÉTÉ COLONIALE ANVERSOISE (SOCIÉTÉ ANONYME) AND SOCIÉTÉ ANONYME DES MINES DE MANGANESE D'OURO-PRETO *v.* LONDON AND BRAZILIAN BANK, LIMITED - - - - - **Scrutton J. 1024**

—— Gaming debt—Proof—Illegal consideration—Guarantee to bank to enable debtor to pay a lost bet - - - - **981**
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**BANKRUPTCY** — *Administration — Creditor of Deceased Debtor—Appeal—"Person aggrieved"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 104, 125.

The appellants, who were creditors of a deceased person, took out an originating summons for the administration of his estate in the Chancery Division. On the same day the respondents, who claimed to be creditors of the estate of the deceased in respect of goods supplied by them after his death for the purpose of his business, which was being carried on by his executrix, presented a petition under s. 125 of the Bankruptcy Act, 1883, praying for the administration of the estate of the deceased in bankruptcy. On this petition an order for administration in bankruptcy was made :—

*Held*, that the appellants were persons "aggrieved" by the order, and were, therefore, entitled to appeal against it.

*Held*, also, that the respondents were not creditors "of a deceased debtor" within s. 125, and that there was, consequently, no jurisdiction to make an order for administration in bankruptcy on their petition. *In re* KITSON. *Ex parte* THOMAS SUGDEN & SON, LD. **Div. Ct. 109**

2. —— *Bankruptcy Notice — Validity — Claim for Judgment Debt and Interest—Income Tax—Deduction—"Yearly Interest."*

A bankruptcy notice required payment of a certain sum claimed as being the amount due on a final judgment. In the margin of the notice particulars of the amount claimed were given, namely, debt so much, interest at 4 per cent. to date so much. Objection was taken that this notice was bad as it claimed interest in full without allowing for income tax which could or ought to have been deducted by the debtor :—

*Held*, that a judgment debt, though by law carrying interest from the date of the judgment, was not a transaction to which the language of the Income Tax Acts relating to "yearly interest of money" applied, and that the notice was valid and the receiving order based upon it rightly made.

*Held*, also (per Buckley L.J.), that what the bankruptcy notice has to require is that the debtor shall pay the judgment debt in accordance with the terms of the judgment : to pay in accordance with the terms of the judgment is to pay the amount for which judgment has been recovered with the legal interest attached to it by the statute : assuming that payment by the debtor of the debt less the income tax would be payment, yet that a notice requiring him to pay the whole sum was none the less right ; and that the notice was valid on this ground also. *In re* T. COOPER - - - - - **C. A. 550**

3. —— *Bankruptcy Notice — Validity — Demand for Payment to Judgment Creditor or his Solicitor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

A bankruptcy notice which requires the debtor to pay the judgment debt to the judgment creditors "or their solicitors," and which contains a statement by the solicitors that they are authorized by the creditors to receive payment and to act for them in respect of all matters specified in the notice, is not a bankruptcy notice "requiring the debtor to pay the judgment debt in accordance with the terms of the judgment" within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, and is consequently not a good foundation for a receiving order. *In re* A DEBTOR, NO. 305 OF 1911 - - **C. A. 718**

4. —— *County Court Bailiff—Warrant of Arrest—"Travelling to execute Warrant"—Mileage—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 25—*Scale of Fees and Percentages under Bankruptcy Acts*, 1883 *and* 1890, *Table C—Practice.*

A warrant for the arrest of a person issued under the Bankruptcy Acts, 1883 and 1890, is not completely executed until the person is lodged in the prison named in the warrant.

Therefore the high bailiff of a county court when travelling to execute such a warrant is entitled to the mileage prescribed in Table C of the Scale of Fees and Percentages under the Bankruptcy Acts, 1883 and 1890, not only from the county court to the place of arrest, but also from that place to the prison where he lodges the person arrested in conformity with the terms of the warrant. *In re* CROPLEY.
**Phillimore J. 309**

5. —— *Judgment Debt—Stay of Execution—Bankruptcy Notice—Appointment of Receiver by way of Equitable Execution—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

A judgment creditor obtained, by way of equitable execution, the appointment of a receiver of certain property of the judgment

**BANKRUPTCY**—*continued.*

debtor. There was no evidence that there was any money of the judgment debtor in the hands of the receiver, nor was he in possession of any interest of the judgment debtor which could be sold :—

*Held*, that as the appointment of the receiver did not prevent the debtor from paying the judgment debt it did not operate as a stay of execution within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, and that the judgment creditor was therefore entitled to serve a bankruptcy notice on the judgment debtor in respect of the judgment. *In re* BOND. *Ex parte* CAPITAL AND COUNTIES BANK, LIMITED

**Div. Ct. 988**

**6.** —— *Petition — Conduct of Petitioning Creditor—Assignment for Benefit of Creditors—Assent — Secret Arrangement — Extortion — "Sufficient Cause" for Refusal of Receiving Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 3.

The debtor, at a time when he was hopelessly insolvent and was about to call a meeting of his creditors, took delivery on credit of goods of considerable value from the petitioning creditors. At the meeting the petitioning creditors refused to assent to an assignment for the benefit of creditors, unless the goods were returned to them or their value allowed ; but, after a resolution for an assignment had been passed, they took part in the nomination of the committee of inspection. On receiving a form of assent to the assignment they telephoned to the accountant who had charge of the debtor's affairs repeating their demand for a return of the goods or payment of their value under a threat of legal proceedings. On the refusal of their demand they commenced an action in the King's Bench Division against the debtor for goods sold and delivered and obtained final judgment against him, and, on his failure to comply with a bankruptcy notice issued in respect of that judgment, filed a petition in bankruptcy against him founded on his non-compliance with the bankruptcy notice :—

*Held*, that the petitioning creditors had not either by any improper conduct or by any assent to the assignment precluded themselves from taking proceedings in bankruptcy, and that "sufficient cause" within s. 7, sub-s. 3, of the Bankruptcy Act, 1883, had not been shewn why a receiving order should not be made.

*In re Shaw* (1901) 83 L. T. 754, explained and distinguished.

*Per* Cozens-Hardy M.R. and Kennedy L.J. : *Semble* the petitioning creditors could not have relied upon the execution of the assignment as an act of bankruptcy. *In re* SUNDERLAND

**C. A. 658**

**7.** —— *Proof—Gaming Debt—Illegal Consideration—Guarantee to Bank to enable Debtor to pay a Lost Bet—Money paid in respect of Agreement void under the Gaming Act*, 1845 (8 & 9 *Vict. c.* 109)—*Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.

In March, 1903, L. lent the debtor 1000*l.* for the purpose of betting on horse races, any profits resulting from the betting to be equally divided. In the same year L. guaranteed an overdraft to the extent of 1000*l.* at the debtor's bank. There were no profits on the betting, and all the money having been lost, L. in September, 1903, guaranteed a further overdraft of 500*l.* in order to enable the debtor to pay bets to that amount which he had lost. In 1906 L. paid 1633*l.* to the bank under his guarantees and recovered judgment in default of defence against the debtor for 3000*l.* The debtor having failed to comply with a bankruptcy notice to pay the amount of the judgment debt, L. presented a bankruptcy petition against him. The registrar dismissed the petition on the ground that, having regard to the Gaming Acts, there was no valid debt to support it :—

*Held*, on appeal, that as to the guarantee for 500*l.* the transaction was not invalid. The debt arising out of the loan for the purpose of enabling the debtor to pay a bet which he had lost, not being for an illegal consideration, could be proved for in bankruptcy ; and the money was not paid by L. "in respect of" a gaming contract within the meaning of s. 1 of the Gaming Act, 1892.

*Held*, also, that inasmuch as the guarantee was given in 1903, and the payment to the bank was not made till 1906, the banking account having been running in the interval, having regard to the rule in *Clayton's Case* (1816) 1 Mer. 585, the original transaction, even if tainted with vice under the Gaming Acts, must be taken to have been wiped out, so that no question arose with regard to it.

*Held*, therefore, on both grounds, that there was a good debt to support the petition.

*Ex parte Pyke* (1878) 8 Ch. D. 754, followed.

*Tatam* v. *Reere*, [1893] 1 Q. B. 44, and *Saffery* v. *Mayer* [1901] 1 K. B. 11, distinguished. *In re* O'SHEA. *Ex parte* LANCASTER

**C. A. 981**

**8.** —— *Proof—Unregistered Money-lender—Money-lending Transaction—Illegal Contract—Judgment in Default of Defence — Subsequent Arrangement not to enforce Judgment—Payment by Instalments—Agreement "with respect to the advance and repayment of money"—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*c*).

The appellant, an unregistered money-lender, became the holder of certain promissory notes made by the debtor in respect of a money-lending transaction and obtained judgment in default of defence against the debtor in an action upon the notes. An arrangement was subsequently made whereby the debtor agreed to pay the debt with certain interest by instalments, and all further proceedings upon the judgment were to be stayed. The debtor having been adjudicated a bankrupt, the appellant claimed to prove in the bankruptcy for the amount due under the arrangement :—

*Held*, (1.) that the arrangement was an agreement entered into by the money-lender in the course of his business as a money-lender "with respect to the advance and repayment of

**BANKRUPTCY**—*continued.*
money" within s. 2, sub-s. 1 (*c*), of the Moneylenders Act, 1900; and (2.) that, the original transaction being unlawful, the judgment would not have been conclusive against the trustee for the purposes of proof, and the subsequent arrangement did not prevent the Court from going behind the transaction and rejecting the proof. *In re* CAMPBELL. *Ex parte* SEAL **C. A. 992**

**9.** —— *Property divisible amongst Creditors—Landlord and Tenant—Assignment of Beneficial Interest in Lease—Trustee and Cestui que Trust—Indemnity—Judgment for Damages for Breach of Covenant—Bankruptcy of Lessee—Vesting of Right of Indemnity in Trustee in Bankruptcy—Recovery of Judgment Debt from Beneficial Owner under Indemnity—Rights of Trustee in Bankruptcy and Landlord—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

A lessee became trustee of the leasehold premises for his wife by reason of the purchase by her of the beneficial interest therein, and the wife as such beneficial owner was liable to indemnify her husband against any claim by the landlord under the covenants in the lease. On the expiration of the lease the landlord obtained judgment against the lessee for 711*l.* for rent and damages for breach of covenant, but before the amount of the lessee's liability was ascertained the lessee was adjudicated a bankrupt. The landlord obtained leave in the bankruptcy to commence an action in the joint names of the trustee in bankruptcy and himself to recover the 711*l.* from the wife under the lessee's right of indemnity, but without prejudice to the question whether the money so recovered should be treated as assets in the bankruptcy or be retained by the landlord. The action was brought and was compromised by the payment by the wife of 520*l.*:—

*Held*, that the trustee in bankruptcy could only avail himself of the right of indemnity for the purpose of passing on the money to the principal creditor, and that consequently the landlord was entitled to retain the money on account of his debt. *In re* RICHARDSON. *Ex parte* THE GOVERNORS OF ST. THOMAS'S HOSPITAL - - - - - **C. A. 705**

**10.** —— *Provable Debt—Contingent Liability—Costs—Order for New Trial—Costs of First Trial to abide Event of New Trial—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *sub-s.* 3.

An order for a new trial provided that the costs of the first trial should abide the event of the new trial. The plaintiff in the action subsequently became bankrupt, but the bankruptcy was annulled before the new trial took place. The new trial resulted in favour of the defendant, and the plaintiff was ordered to pay the costs of the first trial, which had been taxed, and the costs of the second trial to be taxed. The defendant served on the plaintiff a bankruptcy notice in respect of the costs of the first trial. The plaintiff impeached the validity of the bankruptcy notice on the ground that it related to a debt provable in the late bankruptcy:—

*Held*, that at the date of the bankruptcy the

**BANKRUPTCY**—*continued.*
plaintiff was not subject to a contingent liability to pay costs by reason of any obligation incurred before the date of the bankruptcy within s. 37 of the Bankruptcy Act, 1883, and that the objection to the bankruptcy notice failed. *In re* A DEBTOR, No. 68 OF 1911 - - **C. A. 652**

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**BOARD OF AGRICULTURE.** *See* under AGRICULTURE.

**BREAD**—*Sale by Weight — Weights suited to shew Weight of Bread carried for Sale—Bread Act*, 1836 (6 & 7 *Will.* 4, *c.* 37), *s.* 7.

The effect of s. 7 of the Bread Act, 1836, is to impose upon every person who carries out bread for sale from a cart the obligation of carrying such weights as will accurately shew the weight of the bread he purports to sell. TURNER *v.* HOLDER - - **Div. Ct. 562**

**BUILDING**—London Building Act—Party wall—External walls - - **257, 265** *See* LONDON. 2.

—— Party wall—External wall—Wall a party wall for portion of its height - **1143** *See* LONDON. 1.

**BY-LAW**—Validity—Golf course—Preference—Consideration—Metropolitan common—Scheme—Regulation of games - **854** *See* COMMON. 1.

**CARETAKER**—Non-provided school—Duty to maintain and keep efficient—Appointment of caretaker — Management of school - - - - - - **1074** *See* SCHOOLS. 3.

**CARRIAGE**—Hackney carriage—Licence - **32** *See* REVENUE. 5.

—— Hackney carriage—Proprietor—Licence—Application for—Discretion of Commissioner of Police - - - **1131** *See* LONDON. 3.

**CASES**:—
—— *Allan* v. *Liverpool Overseers* and *Inman* v. *Kirkdale Overseers* (1874) L. R. 9 Q. B. 180.
Distinguished by Div. Ct. YOUNG & Co. *v.* LIVERPOOL ASSESSMENT COMMITTEE - **[1911] 2 K. B. 195**

—— *Barrow's Case* - (1880) 14 Ch. D. 432
Followed by C. A. WILKES *v.* SPOONER - - **[1911] 2 K. B. 473**

—— *Batt v. Metropolitan Water Board* [1911] 1 K. B. 845.
Reversed by C. A. **[1911] 2 K. B. 965**

**CASES**—*continued.*

—— *Billericay Rural Council* v. *Poplar Union and Keeling* [1911] 1 K. B. 734.
Affirmed by C. A. [1911] 2 K. B. 801

—— *Coaker* v. *Willcocks* [1911] 1 K. B. 649.
Affirmed, though on somewhat different grounds as to the first-mentioned point, by C. A. - - [1911] 2 K. B. 124

—— *Cole* v. *Miles* (1888) 57 L. J. (M.C.) 132; 60 L. T. 145.
Followed by Div. Ct. ARNOLD *v.* MORGAN - - [1911] 2 K. B. 314

—— *Cooke* v. *Midland Great Western Railway of Ireland* [1909] A. C. 229.
Distinguished by C. A. BARKER *v.* HERBERT - - [1911] 2 K. B. 633

—— *Costard and Wingfield's Case* (1588) 2 Leon. 44.
Dictum in, impugned by Hamilton J. ATTORNEY-GENERAL *v.* REYNOLDS [1911] 2 K. B. 888

—— *David* v. *Britannic Merthyr Coal Co.* [1909] 2 K. B. 146; [1910] A. C. 74.
Followed by C. A. WATKINS *v.* NAVAL COLLIERY CO. (1897), LIMITED [1911] 2 K. B. 162

—— *Deddington Steamship Co.* v. *Inland Revenue Commissioners* [1911] 1 K. B. 1078.
Affirmed by C. A. - [1911] 2 K. B. 1001

—— *Dobson* v. *Collis* - - (1856) 1 H. & N. 81
Approved by C. A. HANAU *v.* EHRLICH [1911] 2 K. B. 1057

—— *Gillow* v. *Durham County Council* [1911] 1 K. B. 222.
Reversed by C. A. [1911] 2 K. B. 1074

—— *Goddard* v. *O'Brien* - (1882) 9 Q. B. D. 37
Questioned by C. A. HIRACHAND PUNAMCHAND *v.* TEMPLE [1911] 2 K. B. 330

—— *Grand Junction Canal Co.* v. *Petty* (1888) 21 Q. B. D. 273.
Followed by Div. Ct. ARNOLD *v.* MORGAN - - [1911] 2 K. B. 314

—— *Groves* v. *Wimborne (Lord)* [1898] 2 Q. B. 402.
Distinguished by C. A. WATKINS *v.* NAVAL COLLIERY COMPANY (1897), LIMITED - - [1911] 2 K. B. 162

—— *Humphries* v. *Humphries* [1910] 2 K. B. 531.
Followed by Div. Ct. COOKE *v.* RICKMAN - - [1911] 2 K. B. 1125

—— *Landauer* v. *Asser* - [1905] 2 K. B. 184
Discussed by Hamilton J. STRASS *v.* SPILLERS & BAKERS, LIMITED [1911] 2 K. B. 759

—— *Lanston Monotype Corporation, Ld.* v. *Anderson* [1911] 2 K. B. 15.
Reversed by C. A. [1911] 2 K. B. 1019

—— *London, Gloucestershire, and North Hants Dairy Co.* v. *Morley & Lanceley* [1911] 2 K. B. 257.
On appeal, case settled [1911] 2 K. B. 1143

**CASES**—*continued.*

—— *Lord Advocate* v. *Stewart* (1906) 8 F. 579
Followed by Hamilton J. ATTORNEY-GENERAL *v.* SECCOMBE [1911] 2 K. B. 688

—— *Lowther* v. *Carlton* (1740) 2 Atk. 139; Barn. 358.
Followed by C. A. WILKES *v.* SPOONER [1911] 2 K. B. 473

—— *McGregor* v. *McGregor* (1888) 21 Q. B. D. 424.
Discussed by C. A. HANAU *v.* EHRLICH [1911] 2 K. B. 1056

—— *Maughan* v. *Free Church of Scotland* (1893) 30 Sc. L. R. 666.
Followed and approved by C. A. REX *v.* SPECIAL COMMISSIONERS OF INCOME TAX - [1911] 2 K. B. 434

—— *Moult* v. *Halliday* - [1898] 1 Q. B. 125
Discussed by Div. Ct. GEORGE *v.* DAVIES - - [1911] 2 K. B. 445

—— *Northumberland (Duke of)* v. *Inland Revenue Commissioners* [1911] 2 K. B. 343.
Reversed by C. A. [1911] 2 K. B. 1011

—— *Pyke, Ex parte* - (1878) 8 Ch. D. 754
Followed by C. A. *In re* O'SHEA. *Ex parte* LANCASTER - [1911] 2 K. B. 981

—— *Ralli* v. *Universal Marine Insurance Co.* (1862) 4 D. F. & J. 1.
Discussed by Hamilton J. STRASS *v.* SPILLERS & BAKERS, LIMITED [1911] 2 K. B. 759

—— *Ranson* v. *Platt* - [1911] 1 K. B. 499
Reversed by C. A. - [1911] 2 K. B. 291

—— *Reg.* v. *Cutbush* (1867) L. R. 2 Q. B. 379
Referred to by Div. Ct. REX *v.* MARTIN - - [1911] 2 K. B. 450

—— *Reg.* v. *Pratt* - - (1855) 4 E. & B. 860
Dicta in, followed by Div. Ct. PRATT *v.* MARTIN - - [1911] 2 K. B. 90

—— *Rex* v. *Ireland* - - [1910] 1 K. B. 654
Approved by C. C. A. REX *v.* MACHARDY - - [1911] 2 K. B. 1144

—— *Rex* v. *Leake* - (1833) 5 B. & Ad. 469
Followed by Div. Ct. ARNOLD *v.* MORGAN - - [1911] 2 K. B. 314

—— *Rex* v. *Metropolitan Police Commissioner, Ex parte Pearce* (1910) 80 L. J. (K. B.) 223; 104 L. T. 135.
Overruled by C. A. REX *v.* METROPOLITAN POLICE COMMISSIONER. *Ex parte* HOLLOWAY [1911] 2 K. B. 1131

—— *Richardson* v. *Mellish* (1824) 2 Bing. 229
Discussed by C. A. CHAPLIN *v.* HICKS [1911] 2 K. B. 786

—— *Rochdale Canal Co.* v. *Brewster* [1894] 2 Q. B. 852.
Distinguished by Div. Ct. YOUNG & CO. *v.* LIVERPOOL ASSESSMENT COMMITTEE - - - [1911] 2 K. B. 195

—— *Saffery* v. *Mayer* - - [1901] 1 K. B. 11.
Distinguished by C. A. *In re* O'SHEA. *Ex parte* LANCASTER [1911] 2 K. B. 981

**CASES**—*continued.*

—— *Shaw, In re* - - (1901) 83 L. T. 754
Explained and distinguished by C. A. *In re* SUNDERLAND
[1911] 2 K. B. 658

—— *Slater* v. *Jones* - - (1873) L. R. 8 Ex. 186
Applied by Horridge J. WEST YORKSHIRE DARRACQ AGENCY, LIMITED *v.* COLERIDGE - [1911] 2 K. B. 326

—— *Tatam* v. *Reeve* - [1893] 1 Q. B. 44
Distinguished by C. A. *In re* O'SHEA. *Ex parte* LANCASTER
[1911] 2 K. B. 981

—— *Vron Colliery Co., In re* (1882) 20 Ch. D. 442.
Distinguished by C. A. ARMORDUCT MANUFACTURING COMPANY *v.* GENERAL INCANDESCENT COMPANY
[1911] 2 K. B. 143

—— *Watson* v. *Ambergate, &c., Railway* (1850) 15 Jur. 448.
Discussed by C. A. CHAPLIN *v.* HICKS
[1911] 2 K. B. 786

**CHARITY**—Income tax—Trustees for charitable purposes — Allowances — Rents and profits - - - - - - 434
*See* REVENUE. 4.

**COMMISSION**—Prohibition of payment of commission—Private company - - 648
*See* COMPANY. 1.

**COMMITTEE**—Public office—Borough council—Membership of committee—Power of member to resign - - - 458
*See* CORPORATION. 2.

**COMMON** — *By-law — Validity — Preference — Consideration — Metropolitan Common—Scheme —Regulation of Games—Golf Course—Metropolitan Commons Act*, 1866 (29 & 30 *Vict. c.* 122) — *Metropolitan Commons (Mitcham) Supplemental Act*, 1891 (54 *Vict. c. xxvi.*).

By a scheme made under the Metropolitan Commons Acts, 1866 and 1869, and confirmed by the Metropolitan Commons (Mitcham) Supplemental Act, 1891, conservators were directed to set apart such portions of a common as they should consider expedient for games and to form grounds for cricket and other games, and to frame by-laws and regulations for (among other purposes) the regulation of games to be played and other means of recreation on the common and generally for the prevention of any act tending to interfere with the use thereof by the public for the purposes of exercise and recreation. No by-laws were to have effect unless and until confirmed by the Local Government Board. The scheme saved to the lords of certain manors their rights in the soil of the commons, but the conservators were empowered upon payment of compensation to restrict, diminish, or extinguish those rights if they should interfere with the control, preservation, or improvement of the common.

With the consent of the conservators a golf club was formed which acquired the rights of the lords of the manors and laid out and maintained on the common two golf courses, the Prince's golf course and the Prince's ladies' golf course. The golf club conveyed to the conservators all their rights over the soil of the common, in return for which the conservators by deed granted to the golf club a licence to play golf upon both the golf courses. By this deed the conservators covenanted that they would not make any such by-laws or regulations as would unreasonably interfere with the club playing golf on the courses and would not permit persons other than those authorized by the club or residents in the parish of Mitcham to play golf or any other game on the courses.

In pursuance of the scheme the conservators made a by-law that no person should play cricket or any other game upon the parts of the common set apart or appropriated for cricket, football, golf, &c., except at such times and under such regulations as the conservators should prescribe, and that no person should obstruct or interfere with or annoy any persons playing at cricket or any other lawful game. They also made the following regulations:—(1.) That golf should not be played upon any part of the common except the Prince's golf course and the Prince's ladies' golf course; (2.) that for the safety of the public and the preservation of the turf, no one should play golf on either of the said courses unless accompanied by a caddie duly authorized and licensed by the conservators or the golf club; (5.) that no one who was not a member of the golf club should play on the Prince's golf course on Saturdays, but that persons holding permits might play on the Prince's ladies' golf course on Saturdays, but must be accompanied by caddies; (7.) that no person should play golf on either of the courses unless he or she were a member of the golf club or an inhabitant of Mitcham holding a permit from the conservators. The by-law was confirmed by the Local Government Board, but the regulations were not submitted for confirmation:—

*Held*, per curiam (Phillimore, Hamilton, and Scrutton JJ.), that regulation 2 was valid.

*Per* Phillimore and Hamilton JJ., that regulation 7 was unequal and void in excluding all but inhabitants of Mitcham and members of the golf club from playing golf on the courses.

*Per* Phillimore and Hamilton JJ. (Scrutton J. dissenting), that regulation 7 and *semble* regulation 5 also were ultra vires and void in giving a permanent preference to the members of the golf club; that the conveyance of their rights in the soil was not a good consideration for such a preference; and that, whether or not the making and maintaining of the golf courses were a good consideration, the preference was not authorized by the by-law and could not be given by mere regulation. CONSERVATORS OF MITCHAM COMMON *v.* COX. SAME *v.* COLE
Div. Ct. 854

**2.** —— *Obligation to fence adjoining Land— Extent of Obligation—Sheep Damage Feasant— Distress—Impounding—Pound in same Hundred*,

**COMMON**—*continued.*
*but more than Three Miles distant* — 1 & 2 *Ph. & M. c.* 12, *s.* 1.

Sheep of the plaintiff, having strayed from unenclosed land forming part of Dartmoor Forest, over which the plaintiff had rights of common, including the right of pasturage for sheep and other commonable beasts, into an adjoining close which belonged to the defendant, were there distrained by him damage feasant, and were impounded by him in a pound within the same hundred, but more than three miles distant from the place where the distress was taken. In an action by the plaintiff against the defendant for a wrongful distress, and for breach of s. 1 of 1 & 2 Ph. & M. c. 12, it was admitted by the defendant for the purposes of the case that he was bound to fence his holding against moorland cattle, including sheep. The plaintiff alleged that the distress was wrongful because the sheep had strayed into the defendant's close through the defendant's breach of his obligation to fence, in having insufficient fences. The sheep in question were Scotch sheep, which possessed extraordinary powers of jumping. It appeared that neither the defendant's fences, nor Dartmoor fences generally, were constructed to keep out Scotch sheep, for which kind of sheep special fences were necessary, but that the defendant's fences were sufficient for keeping out the ordinary moorland sheep :—

*Held*, as a matter of inference from facts before the Court, that the obligation upon the defendant was only to maintain fences such as were usual on Dartmoor, and sufficient to keep out ordinary sheep, and not such fences as would keep out sheep which, like Scotch sheep, possessed extraordinary jumping powers; that, on the true construction of 1 & 2 Ph. & M. c. 12, s. 1, a distrainor of cattle damage feasant may drive the distress to any pound within the hundred, although it be more than three miles from the place where the distress was taken; and, therefore, that the defendant was entitled to judgment.

Decision of the Divisional Court ([1911] 1 K. B. 649) affirmed, though on somewhat different grounds as to the first-mentioned point. COAKER *v.* WILLCOCKS - - - **C. A. 124**

**3.** —— *Rights of Common — Estovers—Turbary—Common Appurtenant — Ancient House—Destruction — New House in continuance of Ancient House—Rebuilding on Old Foundations.*

The destruction of an ancient house, to which rights of common of estovers and turbary were appurtenant, does not necessarily operate as an abandonment of those rights. The rights may be enjoyed as appurtenant to a new house erected in continuance of the ancient house, provided that no greater burden is imposed upon the servient land. The question whether the new house is or is not in continuance of the ancient house is a question of fact. In order to be a continuance of the ancient house it is not necessary that the new house should be built upon the foundations of the ancient house.

Dictum in *Costard and Wingfield's Case* (1588) 2 Leon. 44, impugned. ATTORNEY-GENERAL *v.* REYNOLDS - **Hamilton J. 888**

**COMPANY**—*Commission—Prohibition of Payment of Commission—Private Company—Companies (Consolidation) Act*, 1908 (8 *Edw. 7, c.* 69), *s.* 89.

Sect. 89 of the Companies (Consolidation) Act, 1908, which prohibits (except under the conditions therein specified) the payment by the company of a commission to any person in consideration of his subscribing or procuring subscriptions for shares in the company, applies as well to private as to public companies. DOMINION OF CANADA GENERAL TRADING AND INVESTMENT SYNDICATE *v.* BRIGSTOCKE **Div. Ct. 648**

**2.** —— *Voluntary Liquidation — Judgment Debt — Execution — Postponement obtained by Trickery—Leave to proceed with Execution—Companies (Consolidation) Act*, 1908 (8 *Edw. 7, c.* 69), *s.* 140.

The plaintiffs obtained judgment against the defendant company on February 24, 1911, and their solicitor applied on February 25 to the company's solicitor to obtain and send to him the company's cheque in payment of the judgment debt. The plaintiffs' solicitor was led to believe by the solicitor and by a director of the company that a cheque would be sent in a few days, and in consequence he delayed issuing execution, but he was not told, and did not know, that on February 25 a notice had been sent out convening a meeting of the company for March 6 for the purpose of passing a resolution for the voluntary liquidation of the company on the ground that the company was unable to pay its debts. The meeting was held on March 6 and the resolution for voluntary liquidation was passed. On the same day, the judgment debt not having been paid, the plaintiffs issued execution :—

*Held*, that the postponement of execution had been caused by a trick on the part of the defendant company, and that the plaintiffs, therefore, ought not to be prevented from proceeding with their execution.

*In re Vron Colliery Co.* (1882) 20 Ch. D. 442, distinguished. ARMORDUCT MANUFACTURING COMPANY, LIMITED *v.* GENERAL INCANDESCENT COMPANY, LIMITED - **C. A. 143**

—— Income tax — Foreign investments — Interest of, not remitted home - **577**
*See* REVENUE. 3.

—— Sheriff—Fees—Stay of execution on application of liquidator - - - **595**
*See* SHERIFF.

**COMPENSATION**—Employer and workman.
*See* under EMPLOYER AND WORKMAN.

—— Licensing Acts.
*See* under LICENSING ACTS.

—— Workmen's compensation.
*See* under EMPLOYER AND WORKMAN.

**CONSENT**—Board of Agriculture—Necessity of —Prosecution - - - - **217**
*See* ADULTERATION. 1.

**CONSIDERATION** — Contract — Agreement by creditors mutually to forgo claims—Right of debtor to set up agreement
*See* CONTRACT. 1. **326**

—— Gaming debt—Proof—Illegal consideration—Guarantee to bank to enable debtor to pay a lost bet - - - - **981**
*See* BANKRUPTCY.

**CONSTRUCTIVE NOTICE.**
*See* under NOTICE.

**CONTINGENT LIABILITY**—Provable debt—Costs—Order for new trial - - **652**
*See* BANKRUPTCY. 10.

**CONTRACT** — *Consideration — Agreement by Creditors mutually to forgo Claims—Debtor a Party to Agreement—Claim by one Creditor—Right of Debtor to set up Agreement.*

All the directors of a company in liquidation mutually agreed to forgo their respective claims to directors' fees then owing. The liquidator was a party to the agreement on behalf of the company. Subsequently the company sued one of the directors for work done, and the director counterclaimed against the company for his fees earned previously to the agreement :—

*Held*, that although there was no consideration for the agreement moving from the company, the fact of the liquidator being a party to it rendered it binding as between the director and the company ; and that the agreement was, therefore, a good defence to the counter-claim.

*Slater* v. *Jones* (1873) L. R. 8 Ex. 186, applied. WEST YORKSHIRE DARRACQ AGENCY, LIMITED *v.* COLERIDGE - **Horridge J. 326**

**2.** —— *Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4—*Agreement not to be performed within a Year—Agreement to Employ for Definite Period exceeding one Year—Provision for Determination by Notice by either Party within one Year.*

A contract of service or employment for a definite period exceeding one year, but subject to possible determination within the year upon the happening of a specified event, is within s. 4 of the Statute of Frauds, and must therefore be in writing.

*Dobson* v. *Collis* (1856) 1 H. & N. 81, approved.

*McGregor* v. *McGregor* (1888) 21 Q. B. D. 424, discussed. HANAU *v.* EHRLICH **C. A. 1056**

—— Damages, Measure of—Breach of contract — Remoteness—Inassessability - **786**
*See* DAMAGES.

—— Municipal corporation—Election — Mayor and alderman—Qualification—"Being a councillor"—Interest in contract with council - - - - - **953**
*See* CORPORATION. 1.

—— Sale of goods.
*See* under SALE OF GOODS.

**CONVEYANCING ACT**—Lease — Long lease—Repairing covenant — Breach — Waste
*See* LANDLORD AND TENANT. **234**

**CORPORATION**—*Election—Mayor and Alderman—Qualification — "Being a councillor"—Interest in Contract with Council—Municipal Corporations Act*, 1882 (45 *&* 46 *Vict. c.* 50), *ss.* 12, 14, 15, 73.

The Municipal Corporations Act, 1882, s. 14, sub-s. 3, provides that "a person shall not be qualified to be elected or to be an alderman unless he is a councillor or qualified to be a councillor" ; and by s. 15, sub-s. 1, "the mayor shall be a fit person elected by the council from among the aldermen or councillors or persons qualified to be such." By s. 12, sub-s. 1, "a person shall be disqualified for being elected and for being a councillor if and while he . . . . (*c*) has . . . . any interest in any contract . . . . with . . . . the council."

The respondent, who had been a member of the council of a borough since before 1897, was on November 1, 1902, re-elected a councillor. The respondent was at that date, and continued to be until January 3, 1911, interested in a contract with the council of the borough. On November 9, 1910, the respondent was elected alderman and mayor of the borough :—

*Held*, that as the respondent's election as councillor on November 1, 1909, had not been called in question within twelve months after the election, it must under s. 73 of the Act be deemed to have been a good and valid election ; that his continued interest in the contract did not ipso facto vacate his office of councillor, though it rendered him liable to penalties under s. 41 and possibly to be ousted by a writ of quo warranto ; that the respondent was therefore a councillor at the date of his election as alderman and mayor and was not disqualified from election to those offices. FORRESTER *v.* NORTON **Div. Ct. 953**

**2.** —— *Public Office—Obligation of Appointee to serve—Committee of Borough Council—Membership of Committee—Power of Member to resign—Municipal Corporations Act*, 1882 (45 *&* 46 *Vict. c.* 50), *s.* 22.

By s. 22 of the Municipal Corporations Act, 1882, "The council may from time to time appoint out of their own body such and so many committees, either of a general or special nature and consisting of such number of persons as they think fit, for any purposes which in the opinion of the council would be better regulated and managed by means of such committees, but the acts of every such committee shall be submitted to the council for their approval" :—

*Held*, that the rule of the common law, that a person who is qualified cannot refuse to serve a public office to which he is appointed, does not apply to the appointment of a member of a borough council to serve on a particular committee of the council. Membership of such a committee is not an independent public office, and a person who is appointed to serve on it may lawfully resign it against the will of the council who appointed him.

*Quære*, whether the common law rule applies to statutory offices at all. THE KING *v.* SUNDERLAND CORPORATION - - - **Div. Ct. 458**

—— Adulteration — Sale by corporation — "Person"—False warranty—Reason to believe - - - - - **832**
*See* ADULTERATION. 3.

**CORPORATION**—*continued.*

—— Foreign corporation — Service of writ within the jurisdiction—Business in England — Agent's office — "Head office" - - - - - - - **516**
*See* PRACTICE. 4.

**COSTS**—Bankruptcy—Provable debt—Contingent liability - - - - **652**
*See* BANKRUPTCY. 10.

—— County court bailiff—"Travelling to execute warrant"—Mileage - - **309**
*See* BANKRUPTCY. 4.

—— Notice to debtor of act of bankruptcy committed by creditor—Refusal to pay debt—Action by creditor — Payment into Court—Debtor's right to costs of action - - - - - - - **1088**
*See* PRACTICE. 1.

—— Security for costs—Cross-action—Plaintiffs in cross-action resident out of jurisdiction—Discretion - - - - **619**
*See* PRACTICE. 2.

**COUNCILLOR**—Disqualification—Joint hospital committee for two districts — Clerk of committee — Paid office under council - - - - - - **9**
*See* LOCAL GOVERNMENT. 1.

—— Municipal corporation—Election—Mayor and alderman—Qualification—"Being a councillor" - - - - - **953**
*See* CORPORATION. 1.

**COUNTER-CLAIM**—Adding party—Alternative causes of action - - - - **100**
*See* COUNTY COURT. 3.

**COUNTY COURT**—*Appeal from Decision of Registrar sitting by Request of Judge as Deputy Judge—Consent of Parties—Registrar not Barrister of Seven Years' Standing—Plaintiff's Claim above 2l.—Validity of Appointment of Registrar as Deputy Judge—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 18.

In an action brought in the county court where the claim exceeds 2*l.* the county court judge has no power even with the consent of the parties to appoint as his deputy for the purpose of hearing the action in that capacity a person who is not a barrister of seven years' standing as required by s. 18 of the County Courts Act, 1888. MCINALLY *v.* BLACKLEDGE - **Div. Ct. 432**

**2.** —— *Attachment of Debts — Judgment Debt payable on a Future Date—Garnishee Summons issued before Date named for Payment — Jurisdiction — County Court Rules*, 1903, *Order* XXVI., *rr.* 1, 12, 14.

By Order XXVI., r. 1, of the County Court Rules, 1903, a person who has obtained a judgment or order for the recovery or payment of money may, upon lodging with the registrar of the Court an affidavit stating that judgment has been recovered or an order made, and that "it is still unsatisfied," and to what amount, and that any other person (called the garnishee) is indebted to the judgment debtor, enter a plaint to obtain payment to him of the amount of the debt due to the debtor, and thereupon a summons calling upon the garnishee to shew cause why he should not pay the debt to the judgment creditor shall be issued:—

*Held*, reversing the decision of a Divisional Court, that garnishee proceedings under the above-mentioned rule cannot be commenced upon a county court judgment for payment of money before the time given by the judgment for payment of the money has expired. WHITE, SON & PILL *v.* STENNINGS - - **C. A. 418**

**3.** —— *Counter-claim — Practice — Adding Party—Alternative Causes of Action—County Court Rules*, 1903, *Order* X., *r.* 22.

A person cannot be joined as a defendant to a counter-claim, under Order X., r. 22, of the County Court Rules, 1903, against whom an alternative cause of action only is alleged. TIMES COLD STORAGE COMPANY *v.* LOWTHER & BLANKLEY. LOWTHER & BLANKLEY *v.* TIMES COLD STORAGE COMPANY AND NEW ZEALAND SHIPPING COMPANY - **Div. Ct. 100**

**4.** —— *Practice—Pleading—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61)—*Statute of Limitations — County Court Rules, Order* X., *rr.* 14, 18.

Where an action to which the Public Authorities Protection Act, 1893, applies is brought in the county court, and the defendants desire to rely upon the fact that the action was not commenced within the time thereby limited, it is sufficient to raise that defence by a notice in the form given in Form 85 of the County Court Forms, 1903, "That the claim . . . . is barred by a statute of limitations," without specifying the year, chapter, and section or the title of the statute. GREGORY *v.* TORQUAY CORPORATION **Div. Ct. 556**

**5.** —— *Practice—Removal of Action from County Court to High Court—Discretion of Judge—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 126.

Sect. 126 of the County Courts Act, 1888, provides that "It shall be lawful for the High Court or a judge thereof to order the removal into the High Court, by writ of certiorari or otherwise, of any action or matter commenced in the Court under the provisions of this Act, if the High Court or a judge thereof shall deem it desirable that the action or matter shall be tried in the High Court, and upon such terms as to payment of costs, giving security, or otherwise as the High Court or a judge thereof shall think fit to impose":—

*Held*, that in determining whether it is "desirable" within the meaning of the section that the action should be tried in the High Court the test to be applied is whether it is more fit to be tried in the High Court than in the county court, and that the party applying for the order for removal of the action into the High Court must establish that point.

The defence to an action commenced in the county court depended solely on the determination of a difficult question of law. The defendant,

**COUNTY COURT**—*continued.*

who was the secretary of a local branch of a society, a trade union, was sued on behalf of the society. The plaintiff, a member of the society, was a poor man and, in an application made by the defendant for an order for removal of the action into the High Court, made allegations of oppressive conduct on the part of the society (which, however, the High Court found were not established) with regard to the costs of a former action brought by the plaintiff against it :—

*Held*, that it was desirable within the meaning of the section that the action should be tried in the High Court, and that the order for removal ought to be made, proper terms for the protection of the plaintiff being inserted in the order by virtue of the power conferred by the words "upon such terms as to payment of costs . . . . or otherwise as the High Court or a judge thereof shall think fit to impose" in the section.

*Quære* whether the alleged oppressive conduct on the part of the society would, if it had been established, have been a matter proper to be taken into consideration in determining whether the action should be tried in the High Court instead of the county court. DONKIN *v.* PEARSON **Div. Ct. 412**

—— Bailiff—"Travelling to execute warrant"—Mileage - - - - - **309**
*See* BANKRUPTCY. 4.

**COUNTY COURT RULES, Order X., rr. 14, 18**
*See* COUNTY COURT. 1. **556**

—— **r. 22** - - - - - - - **100**
*See* COUNTY COURT.

—— **Order XXVI., rr. 1, 12, 14** - - - **418**
*See* COUNTY COURT.

**COVENANT**—*Restrictive Covenant—Purchaser for Value without Notice—Subsequent Purchaser with Notice—Constructive Notice.*

The purchaser of land from one who has purchased it for value, without notice, either actual or constructive, of a restrictive covenant, is not bound by the covenant, although he himself had notice of it.

The lessee of premises No. 137, High Street, East Ham, carried on therein the business of a pork butcher. The lease contained a covenant by which he covenanted not to carry on therein any noisy or offensive trade other than that of a pork butcher. He was also lessee under a different landlord of premises No. 170, in the same street, upon which he carried on the business of a general butcher. He sold and assigned to the plaintiff his interest in the last-mentioned premises, and the goodwill of his business as a general butcher, covenanting with the plaintiff (inter alia) that he, his executors, administrators, and assigns, would not "cut, sell or deal in fresh hindquarter beef, mutton, veal, lamb, or poultry at or upon the premises No. 137, High Street, East Ham, or in connection with the business of a pork butcher now carried on there by him." He afterwards gave up business, and surrendered his lease of No. 137 to the landlord ; and a new lease thereof was granted to his son by the landlord, which lease contained a covenant

**COVENANT**—*continued.*

that the lessee would not carry on upon the premises any noisy or offensive trade other than —not "that of a pork butcher," as in the old lease, but—"that of a butcher."

At the time when the landlord accepted the surrender, he had not in fact notice of the restrictive covenant entered into by the father with the plaintiff as regards No. 137, but the son, when the new lease was granted to him, knew of the existence of that covenant. The son afterwards set up the business of a general butcher on the premises No. 137, High Street :—

*Held*, that under the circumstances of the case the landlord was not affected with constructive notice of the father's covenant, and, consequently, could grant to the son a lease free from the restriction of that covenant, and that the son therefore could not be restrained at the suit of the plaintiff from carrying on the business of a general butcher at No. 137.

*Lowther* v. *Carlton* (1740) 2 Atk. 139 ; Barn. 358, and *Barrow's Case* (1880) 14 Ch. D. 432, followed. WILKES *v.* SPOONER - **C. A. 473**

—— Repairing covenant—Breach—Long lease—Waste—Relief against forfeiture **234**
*See* LANDLORD AND TENANT.

**CREDITOR** — Contract—Consideration—Agreement by creditors mutually to forgo claims—Right of debtor to set up agreement - - - - - - **326**
*See* CONTRACT. 1.

—— Sum offered by a third party in satisfaction of a debt—Effect of acceptance by creditor—Extinction of debt - **330**
*See* ACCORD AND SATISFACTION.

**CRIMINAL LAW**—*Appeal—Conviction—Special Verdict—Guilty but Insane at Time he did Act charged—Right of Appeal—Trial of Lunatics Act*, 1883 (46 & 47 *Vict. c.* 38), *s.* 2—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3.

Where upon the trial of an indictment a special verdict is returned under s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, that the accused was guilty of the act or omission charged against him, but was insane so as not to be responsible according to law for his actions at the time when he did the act or made the omission, and an order for his detention is thereupon made under s. 2, sub-s. 2, of the Act, the accused is "a person convicted on indictment" within the meaning of s. 3 of the Criminal Appeal Act, 1907, the finding that the accused was guilty of the act or omission charged against him being a conviction, and therefore he has a right of appeal against the conviction.

*Rex* v. *Ireland* [1910] 1 K. B. 654, approved.

The conviction, however, does not include that part of the finding that the accused was insane at the time when he did the act or made the omission charged against him, such finding being in relief of the accused, and therefore no appeal lies from that part of the verdict. THE KING *v.* MACHARDY - - **C. C. A. 1144**

2. —— *Evidence—Examination of Defendant — Question as to Previous Conviction — Question disallowed—Validity of Conviction—*

**CRIMINAL LAW**—*continued.*
*Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*).

The appellant was charged before justices sitting as a Court of summary jurisdiction with an offence and gave evidence on his own behalf. The solicitor who appeared for the prosecution asked the appellant in cross-examination whether he had been previously convicted of a similar offence. The justices disallowed the question, as being contrary to s. 1 (*f*) of the Criminal Evidence Act, 1898, and no answer was given to it, the solicitor, however, remarking that he had a certified copy of the conviction. The justices convicted the appellant, stating that the above-mentioned incident was entirely ignored by them in arriving at their decision :—

*Held*, that, though the question ought not to have been asked or the observation made, yet inasmuch as the decision of the justices was not affected thereby the conviction was not invalid. BARKER *v.* ARNOLD - - **Div. Ct. 120**

3. —— *Pleading—Autrefois Acquit—Right to plead after Plea of Not Guilty—Double Plea.*

The appellant and another person were charged upon a coroner's inquisition with the murder of a child, and the appellant was also charged alone upon an indictment with the manslaughter of the child, to both of which they pleaded respectively not guilty. Counsel for the prosecution offered no evidence upon the coroner's inquisition for murder, and the jury by direction of the judge found a verdict of not guilty upon the inquisition. Before the jury were sworn to try the indictment the appellant handed in an additional plea of autrefois acquit, and, the jury having been sworn, the appellant was first tried upon that plea. By direction of the judge, the jury found against the appellant on that plea, and he was then tried upon his plea of not guilty and was convicted. Upon appeal against the conviction on the ground that the judge ought to have held that the plea of autrefois acquit was good :—

*Held*, that the appellant, after having pleaded not guilty to the indictment, was not entitled to plead autrefois acquit in addition thereto so long as the plea of not guilty stood upon the record, and that therefore he could not rely upon that plea as a ground for quashing the conviction. THE KING *v.* BANKS - - **C. C. A. 1095**

4. —— *Summary Convictions — Several Offences—Power of Justices to pass Consecutive Sentences—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 25.

Although, upon the authority of *Reg.* v. *Cutbush* (1867) L. R. 2 Q. B. 379, justices, before whom a defendant is at one and the same time convicted of several distinct offences, have jurisdiction under s. 25 of the Summary Jurisdiction Act, 1848, to pass two sentences to run consecutively, they have no jurisdiction to pass more than two consecutive sentences. THE KING *v.* MARTIN - - - - - - **Div. Ct. 450**

**CROSS-ACTION.**
*See* under ACTION.

**CUSTOM**—Domestic servant—Determination of service—Right to wages accrued due
*See* MASTER AND SERVANT. **445**

**CUSTOM**—*continued.*
—— Market overt—Custom of the city of London—Shop—Auction room—Detinue—Trover—Demand and refusal before writ - - - - - - **1031**
*See* SALE OF GOODS. 2.

**CUSTOMS AND INLAND REVENUE.**
*See* under REVENUE.

**DAMAGES**—*Measure of—Breach of Contract—Remoteness—Inassessability.*

Where by contract a man has a right to belong to a limited class of competitors for a prize, a breach of that contract by reason of which he is prevented from continuing a member of the class and is thereby deprived of all chance of obtaining the prize is a breach in respect of which he may be entitled to recover substantial, and not merely nominal, damages.

The existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment.

*Richardson* v. *Mellish* (1824) 2 Bing. 229, and *Watson* v. *Ambergate, &c., Railway* (1850) 15 Jur. 448, discussed. CHAPLIN *v.* HICKS **C. A. 786**

—— Foreign judgment—Award of damages, when enforceable here - - **93**
*See* FOREIGN JUDGMENT.

**DEBENTURE**—Stamp—Marketable security—Debenture purporting to create charge on ships - - - - - - **1001**
*See* REVENUE. 7.

**DEBT**—Attachment of — Garnishee summons issued before date named for payment —Jurisdiction - - - - **418**
*See* COUNTY COURT. 2.

—— Bankruptcy.
*See* under BANKRUPTCY.

—— Sum offered by a third party in satisfaction of a debt — Effect of acceptance by creditor—Extinction of debt - **330**
*See* ACCORD AND SATISFACTION.

**DEBTORS ACT**—*Commitment for Debt—Practice—Order for Payment of Debt or Instalment—Service of Order—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

Where proceedings are taken under s. 5 of the Debtors Act, 1869, for the committal to prison of a judgment debtor who has made default in payment of a debt or instalment of a debt due from him in pursuance of an order of a competent Court, it is not necessary that the order of the Court for payment shall have been served personally on the judgment debtor, although personal service upon him of the judgment summons is required by Order XXV., r. 25 (1.), of the County Court Rules. HAYDON *v.* HAYDON **C. A. 191**

**DEDICATION**—Highway.
*See* under HIGHWAY.

**DEED** — *Delivery of Instrument as Escrow — Assignment of Lease—Delivery to take effect on Death of Assignor—Testamentary Document.*

H., who was the assignee of the lease of a dwelling-house, signed and sealed a document purporting to be an assignment of the lease by him to one Mrs. B., but of which the date was not filled in, and delivered the document to his solicitors upon terms set forth in a letter addressed to him by them as follows:—"We acknowledge that you have to-day executed the assignment of your lease to Mrs. B. as an escrow, and that we are to retain it on your behalf until you send instructions to complete the deed. In the event of your dying before the deed is completed, we understand that we are to consider the deed as having been completed before your death, and to take what steps are necessary to vest the lease in Mrs. B., should she wish it. In the event of Mrs. B. dying before the assignment is completed, you will of course send us further instructions as to what is to be done with the premises." Mrs. B. signed and sealed the document at or about the time when H. did so, but the Court inferred from the circumstances that she did so merely by way of acquiescence in the arrangement, whatever it was, intended by H. The document was not attested so as to satisfy the requirements of the Wills Act. H. died without having given any further instructions in the matter. He occupied, and retained the title deeds of, the house, and paid the rent, rates, and taxes in respect thereof until his death, and had, subsequently to the time when the before-mentioned document was delivered to his solicitors as aforesaid, been party to a deed, reciting that the term was vested in him, by which the lessors granted him permission to make a structural alteration in the house. Mrs. B. survived him:—

*Held*, that the proper inference from the facts was that the above-mentioned document was never legally delivered by H., either absolutely as a deed, or as an escrow, and therefore was inoperative.

A document purporting to be a deed of conveyance by a person of his own property, which is delivered by him on a condition that it shall only become operative upon his death, is a testamentary document, and therefore cannot take effect as an escrow. FOUNDLING HOSPITAL (GOVERNORS AND GUARDIANS) *v.* CRANE
C. A. 367

**DETINUE**—Market overt—Custom of the city of London — Shop — Auction room — Trover — Demand and refusal before writ - - - - - - - 1031
*See* SALE OF GOODS. 2.

**DISCOVERY**—*Interrogatories for Purpose of ascertaining Names of Opponent's Witnesses—Practice.*

Interrogatories put for the mere purpose of obtaining information as to the evidence by which the opposite party intends to prove the facts which he alleges are inadmissible.

In an action brought by the plaintiff to recover damages in respect of personal injuries occasioned to him through being bitten by a dog belonging to the defendant, which was alleged by the plaintiff to have been, to the knowledge of the defendant, accustomed to bite mankind, an order was made that, if the plaintiff intended to give evidence of any specific occasion or occasions on which the dog had bitten persons, he should give particulars thereof, and the plaintiff accordingly gave particulars stating that a person was bitten by the defendant's dog in a certain street in or about June or July, 1908, and another person was bitten by the dog in another street in or about July or August, 1908. The defendant thereupon applied at chambers for leave to administer interrogatories asking the names of the persons alleged in the plaintiff's particulars to have been so bitten. The Master granted the application, and on appeal the judge affirmed his decision:—

*Held* by the Court of Appeal, that the interrogatories were inadmissible on the ground that they were put merely with the object of ascertaining the names of witnesses by whom the plaintiff proposed to establish his case.
KNAPP *v.* HARVEY - - - C. A. 725

**DISCOVERY**—*continued.*

—— Interrogatories — Malicious prosecution — Information upon which defendants commenced prosecution - - 543
*See* PRACTICE. 3.

**DISQUALIFICATION** — Councillor — Joint hospital committee for two districts—Clerk of committee—Paid office under council - - - - - - 9
*See* LOCAL GOVERNMENT. 1.

**DISTRESS**—Sheep damage feasant—Impounding—Pound in same hundred, but more than three miles distant - - 124
*See* COMMON. 2.

**DOCUMENTS**—Inspection of—Privileged documents—Right of parochial elector to inspect - - - - - - 465
*See* PRACTICE. 4.

**DUTY**—Inland Revenue.
*See* under REVENUE.

**EDUCATION.**
*See* under SCHOOLS.

**ELEMENTARY EDUCATION.**
*See* under SCHOOLS.

**EMPLOYER AND WORKMAN**—*Compensation—Agreement — Review — Termination — Partial Incapacity — Return to Work—Evidence — Burden of Proof—Workmen's Compensation Act* 1897 (60 *&* 61 *Vict. c.* 37), *Sched. I., par.* 12.

A collier, by agreement with his employers, received compensation for over two years in respect of an accident which resulted in an injury to his hand. His employers then found him light work at the colliery at his old wages, first as a watchman and afterwards as a signalman. The latter work, which involved climbing up a high hill, the man gave up owing to heart disease, and he then obtained registration of the agreement for compensation. Upon an application by the employers for a review and termination of the weekly payments it was proved (1).

**EMPLOYER AND WORKMAN**—*continued.*
that the heart disease was not due to the accident; (2.) that the man's hand was useless for any ordinary line of work in the labour market:—

*Held*, that the employers had not discharged the onus which lay upon them of proving such a change of circumstances as to justify a termination of the weekly payments. CORY BROTHERS & Co. *v.* HUGHES - - **C. A. 738**

**2.** —— *Compensation — Death — Cause of Death—Conflict of Medical Evidence—Reference to Medical Referee—Jurisdiction—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., par.* 15.

The power conferred upon a county court judge by Sched. II., par. 15, of the Workmen's Compensation Act, 1906, to refer to a medical referee extends to a case where death has resulted from the injury in respect of which compensation is claimed. CAROLAN *v.* HARRINGTON & SON - - - - - - **C. A. 733**

**3.** —— *Compensation—Sphere of Employment—Accident arising "out of" the Employment—Serious and Wilful Misconduct—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-ss.* 1, 2 (*c*).

H., a collier, was employed to drill a hole into a stall below to let out an accumulation of gas; the entrance to the stall from below had been blocked with cross boards to shew that it was unsafe in accordance with the Colliery Special Rules. In defiance of these rules and in breach of an express order by the overlooker, H. entered the stall from below to ascertain the direction of the drill, with the result that he was suffocated by the gas:—

*Held* (Buckley L.J. dissenting) that the accident arose "out of" the employment, and that H.'s dependants were entitled to compensation. HARDING *v.* BRYNDDU COLLIERY COMPANY - - - - - - - **C. A. 747**

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See also a report of *Weighill* v. *South Hetton Coal Co.* as a note at pp. 757, 758 of the above case.

**4.** —— *Negligence—Statutory Duty—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58), *s.* 49, *r.* 30.

By s. 49 of the Coal Mines Regulation Act, 1887, "The following general rules shall be observed, so far as is reasonably practicable, in every mine." By r. 30, "There shall be attached to every machine worked by steam, water, or mechanical power, and used for lowering or raising persons, an adequate break or breaks . . . ."

In a coal mine belonging to the defendants a winding engine worked by steam was used for the lowering and raising of persons in a cage. A miner in the employ of the defendants was killed in August, 1909, by an accident while being lowered in the cage. Some years before the accident the then manager of the mine caused a new brake to be attached to the winding machine for the purpose of being used with a larger cage than had theretofore been used, and this cage was afterwards used under the

**EMPLOYER AND WORKMAN**—*continued.*
directions of the manager for lowering and raising twenty men at a time. A new manager of the mine was appointed in May, 1909, and in the following month he gave directions that the number of men for the lowering and raising of whom the cage was to be used should be increased to twenty-six, and from that time until the date of the accident, about two months afterwards, the cage was used for the purpose of lowering and raising that number of men. In an action brought by the widow of the deceased miner against the defendants under the Fatal Accidents Act, 1846, in respect of her husband's death, the jury found that the brake was adequate for lowering twenty men, but not for lowering twenty-six men; that the inadequacy of the brake, in conjunction with the defective condition of a spanner bar, caused the accident; that the inadequacy of the brake was due to the negligence of the manager in ordering twenty-six men to be allowed to be lowered at a time; and that the inadequacy of the spanner bar was due to an error of judgment on the part of the mechanical engineer, and that neither was due to the negligence of the defendants:—

*Held* by the Court of Appeal (reversing the decision of Pickford J.), that s. 49, r. 30, of the Coal Mines Regulation Act, 1887, did not impose upon the defendants as owners of the mine an absolute unqualified obligation, for any breach of which resulting in personal injury to a miner they would be liable in damages, but only an obligation to provide such a brake and such machinery as their expert manager should deem to be adequate, and that the defendants, having supplied brakes and machinery which were adequate when supplied as part of the equipment of the mine, and having been themselves guilty of no negligence causing or contributing to the accident, were not liable.

*David* v. *Britannic Merthyr Coal Co.* [1909] 2 K. B. 146; [1910] A. C. 74, followed.

*Groves* v. *Lord Wimborne* [1898] 2 Q. B. 402, distinguished. WATKINS *v.* NAVAL COLLIERY COMPANY (1897), LIMITED **C. A. 162**

—— School—Negligent act of teacher—Injury to scholar—Relation of master and servant — Liability of education authority - - - - - **775**
*See* SCHOOLS. 1.

**ELECTION**—Municipal corporation—Mayor and alderman — Qualification — Interest in contract with council - - - **953**
*See* CORPORATION. 1.

**EQUITABLE EXECUTION.**
*See* under EXECUTION.

**ESCROW**—Deed—Delivery of instrument as escrow—Assignment of lease—Testamentary document - - - **367**
*See* DEED.

**ESTATE DUTY.**
*See* under REVENUE.

**ESTOPPEL**—*Res Judicata—Action for Rent due under Agreement—Judgment for Sum admittedly*

**ESTOPPEL**—*continued.*

*due—Second Action—Defence, No Consideration for Agreement.*

The plaintiff sued the defendant in the King's Bench Division for rent alleged to be due under an agreement, and judgment was signed under Order XIV. for a part of the sum claimed which the defendant admitted that she owed. In a subsequent action in the county court between the same parties for further rent under the same agreement, the defendant raised the defence that there was no consideration for the agreement :—

*Held*, on the authority of *Humphries* v. *Humphries* [1910] 2 K. B. 531, that the defendant having admitted in the first action that rent was due from her under the agreement was estopped from raising in the second action the defence of no consideration for the agreement. COOKE *v.* RICKMAN - - - **Div. Ct. 1125**

**ESTOVERS** — Rights of common—Turbary—Common appurtenant—Ancient house — Destruction—New house in continuance of ancient house - - **888**
*See* COMMON. 3.

**EVIDENCE**—Criminal law.
*See* under CRIMINAL LAW.

—— Workmen's compensation—Burden of proof —Agreement—Review—Termination **738**
*See* EMPLOYER AND WORKMAN. 1.

—— Workmen's compensation — Conflict of medical evidence—Reference to medical referee—Jurisdiction - - - **733**
*See* EMPLOYER AND WORKMAN. 2.

**EXECUTION**—Judgment debt—Stay of execution — Bankruptcy notice — Appointment of receiver by way of equitable execution - - - - - - **988**
*See* BANKRUPTCY. 5.

—— Postponement obtained by trickery—Leave to proceed with execution - - **143**
*See* COMPANY. 2.

—— Sheriff—Fees—Company being wound up voluntarily — Stay of execution on application of liquidator - - **595**
*See* SHERIFF.

**EXTRADITION**—*Requisition for Surrender—Conditions of—Validity—Defect in Procedure.*

A warrant was issued by a French magistrate for the arrest of a person charged with an offence to which the extradition treaty between Great Britain and France applied. At the time of issuing that warrant no depositions relating to the charge had been taken on oath before the said magistrate. A requisition was made by the French Government to the British Secretary of State for the surrender of the accused person. By the terms of the treaty the requisition for the surrender of an accused person is to be "accompanied by a warrant of arrest or other equivalent judicial document issued by a judge or magistrate duly authorised to take cognizance of the acts charged against the accused in France together with duly authenticated depositions or

**EXTRADITION**—*continued.*

statements taken on oath before such judge or magistrate." Upon receipt of an order from the Secretary of State in that behalf a police magistrate caused the accused person to be apprehended. The treaty provided that a fugitive criminal who had been so apprehended should be discharged "if within fourteen days a requisition shall not have been made for his surrender in the manner directed" by the treaty :—

*Held*, that it was not essential to the validity of the requisition or of the subsequent proceedings founded thereon that the procedure before the French magistrate should have been regular, and that the absence of sworn depositions taken before that magistrate did not entitle the accused person to be discharged. THE KING *v.* GOVERNOR OF BRIXTON PRISON - **Div. Ct. 82**

**FEES**—Costs.
*See* under COSTS.

—— Sheriff.
*See* under SHERIFF.

**FENCES**—Common—Obligation to fence adjoining land—Extent of obligation - **124**
*See* COMMON. 2.

**FERTILISERS AND FEEDING STUFFS** — Offence — Prosecution — Necessity for consent of Board of Agriculture - **217**
*See* ADULTERATION. 1.

**FIERI FACIAS** — Sheriff — Fees — Liability of execution creditor - - - **595**
*See* SHERIFF.

**FINANCE ACTS.**
*See* under REVENUE.

**FIRE**—Fire-plug—Misleading indication plate—Delay in extinguishing fire — Liability of local authority - - - - **149**
*See* LOCAL GOVERNMENT. 2.

—— Trespass—Justification — Shooting rights—Extinguishing fire—Actual necessity—Reasonable act - - - - **837**
*See* TRESPASS.

**FISHERY ACTS**—*Salmon*—"*Using net for catching salmon*"—*Net ready in Boat — Net not put into the Water—Salmon Fishery Act*, 1865 (28 & 29 *Vict. c.* 121), *s.* 36.

By s. 36 of the Salmon Fishery Act, 1865, any person "using" within a fishery district "any . . . . net . . . . for catching salmon," without having a licence, shall be liable to a penalty.

The respondent, who was in a boat with another man in a river in a fishery district where salmon were usually caught, got out of the boat and walked near the edge of the river looking for salmon. A click net, in size and shape resembling a landing net, was in the boat for the purpose of being put into the water when a salmon was seen near the surface. The respondent had no licence to use the net, and when interrupted by a water bailiff the net was dry, not having been put into the water. Upon an information charging the respondent with having

**FISHERY ACTS**—*continued.*
used the net for catching salmon without having a licence, contrary to s. 36 of the Salmon Fishery Act, 1865, the justices held that there was no evidence that the net was "used" for catching salmon and dismissed the information :—

*Held*, that, as the respondent had begun to search for salmon and had the net with him ready for use, he was "using" the net for catching salmon within the meaning of the section, though he had not actually put the net into the water. MOSES *v.* RAYWOOD - **Div. Ct. 271**

**FOOD AND DRUGS**—Sale of.
*See* under ADULTERATION.

**FOREIGN CORPORATION.**
*See* under CORPORATION.

**FOREIGN INVESTMENTS**—Income tax—Company—Interest not remitted home **577**
*See* REVENUE. 3.

**FOREIGN JUDGMENT** — *Criminal Prosecution for Negligence.*— "*Partie Civile*" — *Award of Damages, when enforceable here.*

By the French law, where an offender is prosecuted for a crime, a person who was injured by the crime may intervene in the prosecution and put in a claim for damages, which claim is tried along with the criminal charge, and upon conviction punishment for the offence and damages for the injury may be awarded by the same judgment :—

*Held*, that in such a case the judgment is severable, and that the portion of it awarding damages to the injured person is not within the rule of international law which prohibits Courts of justice from executing the penal judgments of a foreign Court, but may be enforced by action in this country. RAULIN *v.* FISCHER
**Hamilton J. 93**

**FORFEITURE** — Lease—Repairing covenant — Breach—Waste - - - - **234**
*See* LANDLORD AND TENANT.

—— Licence—"Second offence" - - **1172**
*See* LICENSING ACTS. 2.

**FRAUD**—Agent, Authority of—Fraud of agent —Liability of principal - - **489**
*See* PRINCIPAL AND AGENT.

**FRAUDS, STATUTE OF**—Contract—Agreement to employ for definite period exceeding one year—Provision for determination by notice by either party within one year - - - - - - **1056**
*See* CONTRACT. 2.

**GAME**—*Trespass in pursuit of*—"*Entering or being upon*" *the Land*—*Absence of Personal Entry*—*Game Act*, 1831 (1 *&* 2 *Will.* 4, *c.* 32), *s.* 30.

By s. 30 of the Game Act, 1831, "If any person whatsoever shall commit any trespass by entering or being . . . . upon any land in search or pursuit of game" he shall be guilty of an offence :—

*Held*, that a personal entry upon the land by the defendant is necessary to satisfy the terms of the section, and that it is not enough to send a dog on to the land in search or pursuit of game.

Dicta in *Reg.* v. *Pratt* (1855) 4 E. & B. 860, followed. PRATT *v.* MARTIN - **Div. Ct. 90**

**GAMING**—Proof—Gaming debt—Illegal consideration — Guarantee to bank to enable debtor to pay a lost bet - **981**
*See* BANKRUPTCY. 7.

**GARNISHEE**—Attachment of debts—Garnishee summons issued before date named for payment—Jurisdiction - - **418**
*See* COUNTY COURT. 2.

**GAS COMPANY**—*Breaking up Street*—*Persons entitled to Notice*—*Highway not repairable by Inhabitants at large*—*Persons having* "*control or management*"—*Rural District Council*—*Gasworks Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 15), *s.* 8.

By s. 8 of the Gasworks Clauses Act, 1847, it is enacted that before the undertakers proceed to open or break up any street they shall give to the persons under whose control or management the same may be, or to their clerk, surveyor, or other officer, notice in writing of their intention to open or break up the same, as therein directed.

A gas company, having occasion to lay a gas main under a highway dedicated to the public but not repairable by the inhabitants at large, opened and broke up the highway without giving notice to the rural district council in whose district the same was situate :—

*Held* by Lord Alverstone C.J. and Bray J. (Bankes J. dissenting), that the rural district council was not a person under whose control or management the highway was within the meaning of the above enactment. REDHILL GAS COMPANY *v.* REIGATE RURAL DISTRICT COUNCIL - - - - - - **Div. Ct. 565**

**GOLF** — By-law — Validity — Preference — Consideration — Metropolitan common — Scheme—Regulation of games—Golf course - - - - - - **854**
*See* COMMON. 1.

**GOODS**—Sale of.
*See* under SALE OF GOODS.

**GREAT WESTERN RAILWAY COMPANY**—Trespass—Public highway along railway—Dedication by railway company **314**
*See* JUSTICES.

**HACKNEY CARRIAGE**—Licence - - **32**
*See* REVENUE.

**HIGHWAY**—*Area Railing*—*Nuisance*—*Defective Area Railing* — *Nuisance due to Act of Trespasser*—*Absence of Knowledge by Occupier of Premises*—*Duty of Occupier.*

The defendant was the owner in possession of a vacant house in a street, with an area which adjoined the highway. One of the rails of the area railings had been broken away by boys playing football in the street, and, consequently,

**HIGHWAY**—*continued.*

a gap had been created in the railings. The plaintiff, a child, got through this gap from the street, and was clambering along inside the railings, when he fell into the area, and sustained injuries through the fall. In an action brought on his behalf to recover damages from the defendant in respect of his injuries, the jury found, in answer to questions left to them, that the area was, when the accident happened, a nuisance, but that the defendant did not know, at the time of the accident, that the rail had been removed, that such a time had not elapsed after its removal that he would have known of it at the time of the accident, if he had used reasonable care, and that he had used reasonable care to prevent the premises from becoming dangerous to persons using the highway :—

*Held* that, upon these findings, the defendant was not liable in respect of the nuisance created upon his premises by the action of trespassers.

*Held*, also, by Fletcher Moulton L.J. and Farwell L.J., and *semble* by Vaughan Williams L.J., that the nuisance could not be regarded as the cause of the plaintiff's injuries, inasmuch as he did not fall through the gap in the railings while using the highway, but got through the gap in order to clamber along inside the railings.

*Cooke* v. *Midland Great Western Railway of Ireland* [1909] A. C. 229, distinguished. BARKER *v.* HERBERT - - - **C. A. 633**

**2.** —— *Extraordinary Traffic—Average Expense of repairing Highways in the Neighbourhood—Extraordinary Expenses — Damage recoverable—Highways and Locomotives (Amendment) Act*, 1878 (41 *&* 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 *&* 62 *Vict. c.* 29), *s.* 12.

In an action by a local authority under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by the Locomotives Act, 1898, s. 12, to recover expenses as having been incurred by them in the repair of a highway by reason of damage arising from extraordinary traffic, the local authority must, in order to succeed, prove that those expenses were "extraordinary," and, for the purpose of determining whether they were so, regard must be had to the average expense of repairing similar highways in the neighbourhood.

The judgment of Channell J., reported [1911] 1 K. B. 734, affirmed.

BILLERICAY RURAL COUNCIL *v.* POPLAR UNION AND KEELING - - - **C. A. 801**

**3.** —— *Repairs — Liability to repair — Repairs voluntarily done by Local Authority—Right to Indemnity from Person under Statutory Liability to Repair — Macclesfield Canal Act*, 1826 (7 *Geo.* 4, *c. xxx.*), *ss.* 19, 156.

A canal company, the predecessors in title of the defendants, acting under powers conferred upon them by a private Act of Parliament, made a canal, and in so doing cut through an old highway, which they carried by a new bridge over the canal. The roadway of the bridge having fallen out of repair and become dangerous, the plaintiffs, who were the highway authority for the district, called upon the defendants to do the necessary repairs to the roadway, and, upon their refusal to do so, did the work themselves and brought this action to recover the cost thereof from the defendants :—

**HIGHWAY**—*continued.*

*Held*, (1.) that upon the true construction of the sections of the private Act the defendants, and not the plaintiffs, were liable to repair the roadway over the bridge as well as the fabric of the bridge itself ; and (2.) that the plaintiffs, being under no legal liability to repair the roadway, had acted as mere volunteers in doing the repairs, and could not recover from the defendants the cost so incurred by them. MACCLESFIELD CORPORATION *v.* GREAT CENTRAL RAILWAY - - - - - - **C. A. 528**

—— Dedication—Public highway along railway — Dedication by railway company — Trespass - - - - - - **314**
*See* JUSTICES.

—— Gas company—Breaking up street—Persons entitled to notice - - - - **565**
*See* GAS COMPANY.

**INCOME TAX**—Inland Revenue.
*See* under REVENUE.

**INDEMNITY**—Landlord and tenant—Vesting of right of indemnity in trustee in bankruptcy - - - - - - **705**
*See* BANKRUPTCY. 9.

**INDUSTRIAL AND PROVIDENT SOCIETY**—*Nomination of Person to whom Member's Property in the Society shall be transferred—Limitation of Amount, to what Date referable—Industrial and Provident Societies Act*, 1893 (56 *&* 57 *Vict. c.* 39), *s.* 25.

The Industrial and Provident Societies Act, 1893, s. 25, sub-s. 1, provides that "a member of a registered society may . . . . by a writing under his hand . . . . nominate . . . . any person or persons . . . . to or among whom his property in the society . . . . shall be transferred at his decease, provided the amount credited to him in the books of the society does not 'then' exceed one hundred pounds sterling."

At the time of a nomination made by a member of an industrial and provident society under the above-mentioned sub-section the amount credited to him in the books of the society did not exceed 100*l.*, but at his decease the amount so credited to him exceeded that sum :—

*Held* (by Vaughan Williams L.J. and Kennedy L.J., Farwell L.J. dissenting), that the word "then" in the above-mentioned sub-section refers to the time of the nomination, and not that of the member's decease, and therefore the nomination held good. GRIFFITHS *v.* ECCLES PROVIDENT, INDUSTRIAL, CO-OPERATIVE SOCIETY, LIMITED - - - **C. A. 275**

**INSANITY.**
*See* under LUNACY.

**INSPECTION**—Privileged documents—Right of parochial elector to inspect - - **465**
*See* PRACTICE. 5.

**INSURANCE (LIFE)**—Policy—Stamp duty — Settlement - - - - - - **343**
*See* REVENUE.

—— Policy of — Stamp duty — Settlement — Covenant for payment of premiums—Provision for keeping up policy - **1011**
*See* REVENUE. 7.

**INSURANCE (MARINE)** — *Ship — Damage to Hull—Latent Defect in Stern Frame—Cost of replacing defective Stern Frame.*

A policy of insurance on a ship for twelve months from December 10, 1908, covering the ordinary perils insured against by a Lloyd's policy, provided that the insurance should also cover loss of or damage to the hull through any latent defect in the hull. In 1906, when the ship was built, the builders put into her a stern frame, supplied by a foreign firm, which contained a latent defect that was not discoverable by reasonable inspection until, during the currency of the policy, it became visible owing to the ordinary wear and tear of the ship. The stern frame was in consequence condemned :—

*Held*, that the cost of a new stern frame was not recoverable under the policy. HUTCHINS BROTHERS *v.* ROYAL EXCHANGE ASSURANCE CORPORATION - - - - - **C. A. 398**

**INTERPLEADER** — *Practice — Appeal — Issue tried by Master—Master finally disposing of whole Matter—Appeal from Order on Issue—Court to which Appeal lies—Common Law Procedure Act*, 1860 (23 *&* 24 *Vict. c.* 126), *s.* 17—*Rules of the Supreme Court*, 1883, *Order* XL., *rr.* 6, 6A. ; *Order* LVII., *rr.* 7, 11, 13.

Where an interpleader issue is, under Order LVII., r. 7, ordered to be tried by a Master, and the Master at the trial has made an order determining the issue and finally disposing of the whole matter of the interpleader proceedings, an appeal lies without leave to the Divisional Court from that part of the order which determines the issue. COX *v.* BOWEN - - - **Div. Ct. 611**

**INTERROGATORIES.**
*See* under DISCOVERY.

**ISSUE**—Appeal—Issue tried by Master—Master finally disposing of whole matter—Appeal from order on issue—Court to which appeal lies - - - **611**
*See* INTERPLEADER.

**JUDGMENT** — Foreign judgment — Award of damages, when enforceable here - **93**
*See* FOREIGN JUDGMENT.

**JUDGMENT DEBT**—Stay of execution—Bankruptcy notice—Appointment of receiver by way of equitable execution - **988**
*See* BANKRUPTCY. 5.

**JURISDICTION**—Foreign corporation—Service of writ within the jurisdiction—Business in England—Agent's office—"Head office" - - - - - - - **516**
*See* PRACTICE. 4.

—— Summary jurisdiction—Several offences—Power of justices to pass consecutive sentences - - - - - - **450**
*See* CRIMINAL LAW. 4.

**JUSTICES** — *Justices of the Peace — Ouster of Jurisdiction—Bona fide Claim of Right—Right possible in Law—Public Highway along Railway —Dedication by Railway Company—Trespass—Great Northern Railway (No. 1) Act*, 1882 (45 *&* 46 *Vict. c. ccxiv.*), *s.* 38—*Regulation of Railways Act*, 1868 (31 *&* 32 *Vict. c.* 119), *s.* 23.

In answer to an information charging the defendant before two justices of the peace under s. 38 of the Great Western Railway (No. 1) Act, 1882, with trespassing on a railway in such manner as to expose himself to danger, the defendant alleged that he was lawfully upon the railway in exercise of a right which he claimed as one of the public to pass and repass along the railway as upon a highway dedicated before the passing of the Regulation of Railways Act, 1868, by the railway company or by another railway company with which it had been amalgamated :—

*Held*, that the jurisdiction of the justices was ousted, for that a railway company, like any other statutory body, may dedicate a highway over land vested in it by statute, provided that the dedication is not incompatible with the objects prescribed by the statute.

*Rex* v. *Leake* (1833) 5 B. & Ad. 469, and *Grand Junction Canal Co.* v. *Petty* (1888) 21 Q. B. D. 273, followed.

*Held*, also, following *Cole* v. *Miles* (1888) 57 L. J. (M.C.) 132 ; 60 L. T. 145, that the question whether such a dedication is compatible with those objects is not a question to be tried by justices in petty sessions.

*Held*, also, following *Cole* v. *Miles*, supra, that the question, whether a highway dedicated by a railway company before the passing of the Regulation of Railways Act, 1868, had been extinguished by s. 23 of that Act, was not a question for the justices ; and that, if it were, it ought to be answered in the negative. ARNOLD *v.* MORGAN - - - - - **Div. Ct. 314**

—— Adulteration—Sale of food and drugs.
*See* under ADULTERATION.

—— Bread.
*See* under BREAD.

—— By-law—Validity—Metropolitan common —Golf course - - - - - **854**
*See* COMMON. 1.

—— Criminal law.
*See* under CRIMINAL LAW.

—— Extradition.
*See* under EXTRADITION.

—— Fishery Acts.
*See* under FISHERY ACTS.

—— Game—Trespass in pursuit of—Absence of personal entry - - - - - **90**
*See* GAME.

—— Gas company—Breaking up street—Persons entitled to notice - - - - **565**
*See* GAS COMPANY.

—— Licensing Acts.
*See* under LICENSING ACTS.

**JUSTICES**—*continued.*

—— Local government.
*See* under LOCAL GOVERNMENT.

—— Offences—Public health.
*See* under LOCAL GOVERNMENT.

—— Public office—Obligation of appointee to serve—Committee of borough council—Membership of committee—Power of member to resign - - - **458**
*See* CORPORATION. 2.

—— Rates.
*See* under RATES.

—— Schools.
*See* under SCHOOLS.

—— Several offences—Power of justices to pass consecutive sentences - - - **450**
*See* CRIMINAL LAW. 4.

—— Street, Laying out new—Plan—Approval
*See* LOCAL GOVERNMENT. 5. **361**

—— Streets.
*See* under STREETS.

—— Water rate—Empty house—Right of water company to cut off supply - - **74**
*See* WATER. 2.

**JUSTIFICATION**—Trespass.
*See* under TRESPASS.

**LANDLORD AND TENANT**—*Long Lease—Repairing Covenant — Breach — Waste — Relief against Forfeiture—Terms of Relief—Conversion of Chapel into Theatre—Structural Alterations—Reinstatement—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 11, *sub-ss.* 1, 2, 3.

A piece of ground and the chapel then being erected thereon were demised for a term of ninety-nine years less ten days from Christmas, 1842, and the lease contained covenants by the lessees to complete the chapel by a given date and from time to time during the term to repair, maintain, and keep the chapel and the walls, fences, and other appurtenances thereto belonging in good and substantial repair. The chapel was used as a place of religious worship under the terms of a trust deed for sixty years. The lease was then sold with the consent of the Charity Commissioners, and the premises were adapted for a theatre. For this purpose the purchasers removed some iron railings which separated the premises from the adjoining street, opened a new door in the west wall of the building, and removed two staircases and constructed two new staircases at the opposite end of the building. The vendor had neglected to comply with a notice to repair, and the reversioner was entitled to possession subject to the question of relief against forfeiture :—

*Held* (Buckley L.J. dissenting), that the alterations were breaches of the covenant to repair and were acts of waste which the Court would restrain by injunction, and that the relief ought not to be granted except on the terms of the reinstatement of the premises in their former condition.

**LANDLORD AND TENANT**—*continued.*

The principles on which relief against forfeiture will be granted considered. ROSE *v.* SPICER. ROSE *v.* HYMAN - - - **C. A. 234**

—— Bankruptcy — Assignment of beneficial interest in lease—Rights of trustee in bankruptcy and landlord - - **705**
*See* BANKRUPTCY. 9.

**LEASE**—Landlord and tenant.
*See* under LANDLORD AND TENANT.

—— Stamp - - - - - - - **24**
*See* REVENUE. 6.

**LICENCE**—Hackney carriage - - - **32**
*See* REVENUE. 5.

—— Hackney carriage — Discretion of Commissioner of Police - - - **1131**
*See* LONDON. 3.

**LICENSING ACTS** — *Justices — Committee of Quarter Sessions acting as Compensation Authority—Supplemental Meeting—Power to state a Case—Apportionment of Compensation—Person interested in Licensed Premises — Registered Owner—Lord of the Manor—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2—*Licensing Rules*, 1904, *rr.* 27, 37.

The committee of quarter sessions appointed under the Licensing Act, 1904, when holding a supplemental meeting for the purpose of settling the shares in which the compensation money is to be divided among the persons entitled to compensation has power to state a case for the opinion of the King's Bench Division.

The freehold in all the copyhold lands in a manor was vested in the appellants, who were entitled to all the usual manorial rights, including a fine on the admittance of a tenant. A beer-house was situate on copyhold land within the manor of which the respondents were copyhold tenants holding the same by copy of court roll. The appellants were registered as owners of the beer-house. The renewal of the licence of the beer-house having been refused :—

*Held*, that the appellants were persons interested in the licensed premises as owners, and were, therefore, entitled to share in the compensation money. ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* PAGE **Div. Ct. 946**

**2.** —— *Offence* — "*Second Offence*" — *Forfeiture of Licence—Selling Liquor at Place not covered by Licence—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

By s. 3 of the Licensing Act, 1872, any person selling or exposing for sale any intoxicating liquor at a place where he is not licensed to sell the same shall be liable, "for the first offence," to a penalty not exceeding 50*l.* or to imprisonment for a term not exceeding one month ; "for the second offence," to a penalty not exceeding 100*l.* or to imprisonment for a term not exceeding three months ; and "for the third and any subsequent offence" to a penalty not exceeding 100*l.* or to imprisonment for a term not exceeding six months. "In addition to any other penalty imposed by this section

**LICENSING ACTS**—*continued.*
any person convicted of a second or any subsequent offence under this section shall, if he be the holder of a licence, forfeit such licence" :—
*Held*, that the expression "second or any subsequent offence" in s. 3 means a second or subsequent offence committed after a previous conviction or previous convictions, as the case may be, for an offence under the section, and that therefore the licence is not forfeited upon a second conviction for an offence which is committed before the conviction for the first offence. THE KING *v.* SOUTH SHIELDS LICENSING JUSTICES - - - - - - **Div. Ct. 1**

**LICENSING RULES, 1904, rr. 27, 37 - 946**
*See* LICENSING ACTS. 1.

**LIFE INSURANCE.**
*See* under INSURANCE (LIFE).

**LIMITATIONS, STATUTE OF**—Public Authorities Protection Act—Practice—Pleading - - - - - - - - **556**
*See* COUNTY COURT. 4.

**LOCAL GOVERNMENT** — *Councillor, Urban District—Disqualification—Joint Hospital Committee for Two Districts—Clerk of Committee—Paid Office under Council—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 46.
By an agreement between the corporation of a borough and the council of an urban district a joint committee was formed for the purpose of providing hospitals for the use of the inhabitants of the borough and district jointly, half the committee being appointed by the corporation and half by the district council. The appellant was appointed by the committee as their salaried clerk, and was paid his salary by them out of funds which were in part derived from contributions by the corporation and the district council respectively :—
*Held*, that the appellant was the holder of "a paid office under the district council" within the meaning of s. 46 of the Local Government Act, 1894, and consequently was disqualified from being a member of that council, none the less because the corporation joined in his appointment and in the payment of his salary. GREVILLE-SMITH *v.* TOMLIN - - **Div. Ct. 9**

2. —— *Fire-Plug — Misleading Indication Plate—Delay in extinguishing Fire—Liability of Local Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 66.
By s. 66 of the Public Health Act, 1875, every urban authority is required to cause fire-plugs to be provided and maintained, and to "paint or mark on the buildings and walls within the streets, words or marks near to such fire-plugs to denote the situation thereof."
The defendants, a local authority, affixed to a wall in a street which was not repairable by the inhabitants at large a plate intended to indicate the position of a fire-plug in the water main and marked "F. P. 22 ft. 3 in." ; in fact, a line drawn straight from the plate across the street for the required distance crossed the water main at a spot 6 feet 10 inches away from the place where the fire-plug was inserted in the

**LOCAL GOVERNMENT**—*continued.*
main. A fire broke out on the plaintiffs' premises, which were a short distance from the plug ; the fire brigade were quickly in attendance, but there was considerable delay owing to their inability to find the exact position of the fire-plug, as a result of which delay the fire assumed greater dimensions and caused more damage than it would otherwise have done :—
*Held*, that, in putting up an indication plate which was in fact misleading, the defendants were guilty of an act of misfeasance, and not of non-feasance only, and that they were therefore liable to the plaintiffs for the extra loss caused by the fire as damages for breach of their statutory duty. DAWSON & CO. *v.* BINGLEY URBAN DISTRICT COUNCIL - - - - **C. A. 149**

3. —— *Offences—Diseased Meat — Sale—Seizure when in Possession of Purchaser—Condemnation—Liability of Seller to Penalty—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117— *Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 28.
The appellant sold at her shop to a customer a piece of meat for human food. The meat was unsound and unfit for food at the time of sale. The customer took the meat away with her. On the following day it was seized at the customer's house by an inspector of nuisances. The meat was subsequently condemned by a justice :—
*Held*, that, although the meat had not been seized while on the appellant's premises, the appellant was liable to be convicted of an offence in respect of the sale of the meat under s. 117 of the Public Health Act, 1875, as amended by s. 28 of the Public Health Acts Amendment Act, 1890. SALT *v.* TOMLINSON - **Div. Ct. 391**

4. —— *Offence—Unsound Meat — Prosecution by Superintendent of Police—Proceeding for Recovery of Penalty—Necessity for Attorney-General's Consent—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 253.
By s. 116 of the Public Health Act, 1875, any medical officer of health or inspector of nuisances may inspect any meat, &c., exposed for sale or deposited in any place for the purpose of sale or of preparation for sale, and intended for the food of man, and if it appears to him to be diseased or unsound he may seize it and carry it before a justice ; and by s. 117, if it appears to the justice to be diseased or unsound he shall condemn it and order it to be destroyed, and the person to whom the same belongs or in whose possession it was found shall be liable to a penalty or, at the discretion of the justice, to imprisonment ; and the justice who, under the section, is empowered to convict the offender may be either the justice who has ordered the article to be destroyed, or any other justice having jurisdiction in the place. By s. 251, all offences under the Act and all penalties directed to be recovered in a summary manner, or the recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts before a Court of summary jurisdiction, constituted of two or more justices ; and by s. 253, "proceedings for the recovery of any penalty under this Act shall

**LOCAL GOVERNMENT**—*continued.*
not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General" :—

*Held*, that a prosecution under s. 117 is a proceeding to recover a penalty within the meaning of s. 253, and therefore the consent in writing of the Attorney-General is necessary where the prosecution is instituted by a person other than a party aggrieved or the local authority, there being no express provision in s. 117 authorizing any person other than the above to prosecute. DODD *v.* PEARSON - **Div. Ct. 383**

5. —— *Plans — Laying out New Street—Plan—Approval of Local Authority—Restrictive Covenant—Impossibility of complying with By-law—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 158.

The owner of a building estate deposited with the local authority plans of works intended to be executed by him, including, inter alia, a new street of the minimum width permitted by a local by-law. Part of the site of the new street lay on a field which was subject to a restrictive covenant preventing the field from being used for the purpose of a street. The local authority refused to approve the plans on the ground that the existence of the covenant made it impossible for a new street of the width shewn on the plans to be constructed :—

*Held*, that the local authority were entitled to refuse to approve the plans on that ground. THE KING *v.* TYNEMOUTH CORPORATION **Div. Ct. 361**

—— Inspection of documents—Privileged documents—Right of parochial elector to inspect - - - - - **465**
*See* PRACTICE. 5.

—— Streets.
*See* under STREETS.

**LOCOMOTIVES**—Extraordinary traffic.
*See* under HIGHWAY.

**LONDON**—*Building — Party Wall — External Wall— Wall a Party Wall for Portion of its Height—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 5, 58.

Appeal from the judgment of a Divisional Court (Phillimore J. and Bankes J.) on an appeal from a county court, [1911] 2 K. B. 257.

After the arguments on the appeal had proceeded for a considerable time, the parties arrived at a settlement in respect of the matters involved in the case, and consequently no judgment was given upon the questions of law raised by the appeal. Case settled. LONDON, GLOUCESTERSHIRE, AND NORTH HANTS DAIRY COMPANY *v.* MORLEY & LANCLEY **C. A. 1143**

2. —— *Building — Party Wall — "Party structure defective or out of repair"—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 88.

By s. 88 of the London Building Act, 1894, a building owner as defined by s. 5 has a right

**LONDON**—*continued.*
to make good, underpin, or repair any party structure which is defective or out of repair :—

*Held*, that a wall which has become a party structure within the meaning of the Act, although originally built for other purposes and still sufficient for those purposes, may from dampness or other causes be as a party structure defective within the meaning of s. 88. MINTURN *v.* BARRY - - - - - **Div. Ct. 265**

3. —— *Hackney Carriage — Proprietor—Licence—Application for—Discretion of Commissioner of Police — Metropolitan Public Carriage Act*, 1869 (32 & 33 *Vict. c.* 115), *ss.* 6, 11—*Order of Secretary of State dated December* 30, 1907, *regulations* 1 *and* 4.

The discretion of the Commissioner of the Metropolitan Police in regard to the granting of licences for cabs or stage carriages under the regulations made by the Secretary of State in pursuance of ss. 6 and 11 of the Metropolitan Public Carriage Act, 1869, is not a general discretion to grant or refuse all applications. It is limited to the exceptions contained in clauses (*a*) and (*b*) of regulation 1 of the Order of the Secretary of State dated December 30, 1907.

*Rex* v. *Metropolitan Police Commissioner, Ex parte Pearce* (1910) 80 L. J. (K.B.) 223; 104 L. T. 135, overruled. REX *v.* METROPOLITAN POLICE COMMISSIONER. *Ex parte* HOLLOWAY - - - - - **C. A. 1131**

4. —— *Waterworks—Communication Pipe—Stop-cock Box — Liability of Householder to Repair — Power to break up Street for that Purpose—Metropolitan Water Board (Charges) Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 19.

The provision of the Metropolitan Water Board (Charges) Act, 1907, s. 8, which imposes on the owner or occupier of a house requiring a supply of water from the Metropolitan Water Board the duty of maintaining the communication pipe and apparatus necessary for the purposes of such supply, applies in the case of a communication pipe and apparatus already laid down at the date of, as well as in the case of such a pipe and apparatus laid down after, the coming into operation of the above-mentioned Act.

Accordingly, where a person passing along a street within the limits of supply of the Metropolitan Water Board sustained injury through non-repair of a stop-cock box which had been placed in the pavement in connection with a communication pipe before the coming into operation of the above-mentioned Act :—

*Held*, reversing the decision of a Divisional Court, [1911] 1 K. B. 845, that the Metropolitan Water Board was not liable in respect of the non-repair of the stop-cock box. BATT *v.* METROPOLITAN WATER BOARD - **C. A. 965**

—— Bailment — Warehouseman — Order by magistrate that goods be delivered to third party—Effect of - - - **291**
*See* BAILMENT.

—— Market overt — Custom of the city of London — Shop — Auction room — Detinue—Trover—Demand and refusal before writ - - - - - **1031**
*See* SALE OF GOODS. 2.

**LONDON**—*continued.*

—— Rates — Quinquennial valuation — Provisional list—"Subsequently made" *See* RATES. 2. 822

—— Water.
*See* under WATER.

**LUNACY** — Criminal law—Appeal—Conviction —Special verdict—Guilty but insane at time he did act charged—Right of appeal - - - - - - 1144
*See* CRIMINAL LAW. 1.

**MACCLESFIELD CANAL ACT, 1826** - - 528
*See* HIGHWAY.

**MAGISTRATES.**
*See* under JUSTICES.

**MANDAMUS**—Vestry clerk—Mandamus to overseers to pay salary - - - 669
*See* VESTRY CLERK.

**MANOR** — Licensing Acts—Apportionment of compensation—Lord of the manor 946
*See* LICENSING ACTS. 1.

**MARINE INSURANCE.**
*See* under INSURANCE (MARINE).

**MARKET OVERT**—Custom of the city of London — Shop — Auction room — Detinue—Trover—Demand and refusal before writ - - - - - - 1031
*See* SALE OF GOODS. 2.

**MASTER** — Appeal—Issue tried by Master—Master finally disposing of whole matter —Appeal from order on issue—Court to which appeal lies - - - 611
*See* INTERPLEADER.

**MASTER AND SERVANT**—*Domestic Servant—Determination of Service—Custom—Notice during First Fortnight—Determination at End of First Month—Servant leaving Service in Breach of Contract—Right to Wages accrued due.*

The plaintiff, a domestic servant, entered the defendant's service on November 3, 1910, at yearly wages payable monthly, there being no express agreement as to notice. On November 17 she gave notice to leave at the expiration of the first month of her service. She accordingly left on December 3, and upon the defendant refusing to pay her the wages for the month during which she had been in the service, upon the ground that she had left without giving one month's notice, she brought an action in the county court to recover the month's wages, alleging a custom that either party to the contract of the hiring of a domestic servant was entitled, in the absence of special agreement as to notice, to determine the service at the end of the first month by notice given at or before the expiration of the first fortnight. The plaintiff called no evidence in support of the custom. The county court judge said that he had taken judicial notice of the custom in previous cases, and he would take judicial notice of it in this case. He accordingly gave judgment for the plaintiff for the amount claimed :—

**MASTER AND SERVANT**—*continued.*

*Held*, that the county court judge was entitled to take judicial notice of the custom; and further that, apart from the custom, and assuming that the plaintiff wrongfully left the defendant's service, she was entitled to recover the month's wages which had already accrued due to her.

*Moult* v. *Halliday* [1898] 1 Q. B. 125, discussed. GEORGE *v.* DAVIES - **Div. Ct. 445**

—— Employer and workman.
*See* under EMPLOYER AND WORKMAN.

**MEDICAL EVIDENCE**—Conflict of—Reference to medical referee—Workmen's compensation - - - - - - 733
*See* EMPLOYER AND WORKMAN. 2.

**MERCHANT SHIPPING.**
*See* under SHIPPING.

**MERSEY DOCKS**—Poor rate—Exclusive occupation - - - - - - - 195
*See* RATES. 1.

**METROPOLIS.**
*See* under LONDON.

**METROPOLITAN POLICE COURTS ACT, 1839**
*See* BAILMENT. 291

**MINES** — Negligence — Statutory duty— Coal mines regulation - - - - 162
*See* EMPLOYER AND WORKMAN. 4.

**MISCONDUCT** — Workmen's compensation — Serious and wilful misconduct—Sphere of employment—Accident - - 747
*See* EMPLOYER AND WORKMAN. 3.

**MITCHAM COMMON**—By-law—Validity—Preference— Consideration — Metropolitan common—Scheme—Regulation of games —Golf course - - - - - 854
*See* COMMON. 1.

**MONEY-LENDER**—Proof—Unregistered moneylender — Money-lending transaction—Illegal contract - - - - - 992
*See* BANKRUPTCY. 8.

**MORTGAGE** — Stamp — Marketable security — Debenture purporting to create charge on ships - - - - - 1001
*See* REVENUE. 7.

**MUNICIPAL CORPORATION.**
*See* under CORPORATION.

**NEGLIGENCE** — School — Negligent act of teacher—Injury to scholar—Relation of master and servant—Liability of education authority - - - - - 775
*See* SCHOOLS. 1.

—— Statutory duty—Coal mines regulation 162
*See* EMPLOYER AND WORKMAN. 4.

—— Warehouseman—Notice of claim to bailor —Order by magistrate that goods be delivered to third party—Effect of 291
*See* BAILMENT.

**NOTICE**—Bankruptcy notice.
*See* under BANKRUPTCY.

**NOTICE**—*continued.*
—— Purchaser for value without notice—Restrictive covenant — Subsequent purchaser with notice—Constructive notice
*See* COVENANT. 473

**NUISANCE**—Highway—Defective area railing—Nuisance due to act of trespasser 633
*See* HIGHWAY. 1.

**OFFENCES**—Public health.
*See* under LOCAL GOVERNMENT.

**PARLIAMENT** — *Registration of Voters—Revising Barrister—Evidence—Occupier—Dwelling-house — Objection—Prima facie Proof — Rebuttal—Occupation of Part of a House—Owner resident in Part and rated for the Whole —Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 7—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 3, 4, 19—*Parliamentary and Municipal Registration Act*, 1878 (40 & 41 *Vict. c.* 26), *s.* 14; *s.* 28, *sub-ss.* 10, 11.

A person objecting to the name of a voter in a list of electors, as the occupier of a dwelling-house, having given prima facie proof of the ground of objection within the meaning of s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, by proving (1.) that the dwelling-house formed part of a building which would itself be ordinarily described as a dwelling-house, (2.) that the landlord resided in the building, and (3.) that the landlord was rated for the whole of the building, the voter proved that no services were rendered by the landlord, that the landlord claimed no right and never in fact exercised any right of control over the dwelling-house, and that at the time of letting the dwelling-house no terms were specifically mentioned either by the landlord or the voter except as to the number and situation of the rooms constituting the dwelling-house, the amount of the rent, and the times at which it was payable.

The premises occupied by the voter did not come within the provisions of ss. 3 or 4 of the Poor Rate Assessment and Collection Act, 1869:—

*Held* by the King's Bench Division, that the voter had not proved himself entitled to have his name inserted in the list within sub-s. 11 of s. 28 of the Act of 1878.

*Held* by the Court of Appeal, that the voter was not entitled to have his name inserted in the list, upon the ground that he had not been rated or paid rates in respect of the premises occupied by him, and the owner could not in such a case be legally rated instead of the occupier. KENT *v.* FITTALL - - **C. A. 1102**

**PARLIAMENTARY AND MUNICIPAL REGISTRATION.**
*See* under PARLIAMENT.

**PARTY WALL** — Building — External wall—Wall a party wall for portion of its height - - - - - - **1143**
*See* LONDON. 1.

**PARTY WALL**—*continued.*
—— London Building Act - - - - **265**
*See* LONDON. 2.

**PATENT** — Income tax—Average profits and gains—Deduction—Royalty ceasing to be payable - - - - - - **1019**
*See* REVENUE. 2.

**PAYMENT INTO COURT** — Costs — Debtor's right to costs of action - - **1088**
*See* PRACTICE. 1.

**PENALTY**—Pharmacy Acts.
*See* under PHARMACY ACTS.

—— Trade union.
*See* under TRADE UNION.

**"PERSON"**—Adulteration—Sale by corporation —False warranty—Reason to believe
*See* ADULTERATION. 3. **832**

**PHARMACY ACTS**—*Poison—Sale—Poisonous Substance to be used in Agriculture or Horticulture—Bottle not labelled with Name and Address of Seller—Failure to conform to Regulations—Penalty—Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *ss.* 15, 17—*Poisons and Pharmacy Act*, 1908 (8 *Edw.* 7, *c.* 55), *s.* 2.

Sect. 15 of the Pharmacy Act, 1868, provides that any person who shall sell poisons, not being a registered pharmaceutical chemist, or chemist and druggist, shall be liable to pay a penalty which may be sued for. By s. 2 of the Poisons and Pharmacy Act, 1908, s. 15 of the Act of 1868 shall not apply to a seller of poisonous substances to be used exclusively in agriculture and horticulture who is duly licensed under s. 2 of the Act of 1908 and who conforms to the regulations made under that Act.

The defendant, who was not a registered pharmaceutical chemist, or chemist and druggist, was duly licensed by a local authority under s. 2 of the Poisons and Pharmacy Act, 1908, to sell poisonous substances to be used exclusively in agriculture or horticulture. The defendant failed to conform to the regulations made under the Act of 1908, in that he sold a poisonous substance in a bottle which was not labelled with his name and address. The plaintiffs sued the defendant for the recovery of a penalty under s. 15:—

*Held*, that the defendant was liable to pay a penalty under s. 15, and none the less so because the facts shewed that he had also committed an offence under s. 17 of the Act of 1868. PHARMACEUTICAL SOCIETY *v.* JACKS - **Div. Ct. 115**

**PLAN**—Approval of local authority—Laying out new street — Restrictive covenant — Impossibility of complying with by-law
*See* LOCAL GOVERNMENT. 5. **361**

**PLEADING**—Autrefois acquit—Right to plead after plea of not guilty—Double plea
*See* CRIMINAL LAW. 3. **1095**

—— Practice.
*See* under PRACTICE.

**POISON**—Sale.
*See* under PHARMACY ACTS.

**POLICY**—Insurance (Life).
*See* under INSURANCE (LIFE).

—— Stamp duty—Settlement - - - 1011
*See* REVENUE. 8.

—— Sale of goods—Honour policy on increased value—Right of buyer to policy - 759
*See* SALE OF GOODS. 1.

**POOR RATE.**
*See* under RATES.

**POOR RATE ASSESSMENT AND COLLECTION.**
*See* under PARLIAMENT.

**POUND**—Sheep damage feasant—Distress—Impounding—Pound in same hundred, but more than three miles distant - 124
*See* COMMON. 2.

**PRACTICE**—*Costs—Notice to Debtor of Act of Bankruptcy committed by Creditor—Refusal to pay Debt—Action by Creditor—Payment into Court—Debtor's Right to Costs of Action.*

A creditor who had committed an available act of bankruptcy demanded payment from his debtors, but they refused to pay upon the ground that they had notice of the act of bankruptcy. The creditor sued them and they at once paid the money into Court under an order made upon their application. The plaintiff issued a summons for judgment under Order XIV., which was adjourned until the expiration of three months from the date of the act of bankruptcy. After the three months expired the plaintiff obtained leave to sign final judgment and an order that each party should pay their own costs, except that the defendants should pay the plaintiff's costs of the application to pay into Court:—

*Held* (allowing the appeal), that the defendants were entitled to their costs of the action, including the costs of the application to pay into Court. MCCARTHY *v.* CAPITAL AND COUNTIES BANK - - - - C. A. 1088

**2.** —— *Costs—Security for Costs—Cross-Action—Plaintiffs in Cross-Action resident out of Jurisdiction—Discretion.*

There is no hard and fast rule of practice which prevents the Court from making an order for security for costs against a person resident out of the jurisdiction who, upon being sued in this country, sets up a cross-claim either by counter-claim or by cross-action. It is for the Court to consider, in the exercise of its discretion, whether, having regard to the circumstances of the particular case, the cross-claim must be treated as made, substantially, by way of defence to the action against the claimant, or whether it must be regarded as being in the nature of an independent claim made in respect of matters foreign to that action, and therefore one with regard to which security for costs ought to be ordered to be given.

An agreement was made between insurance company A. and insurance company B., which was a foreign company carrying on business out of the jurisdiction, for the re-insurance by the latter company of a certain proportion of fire

**PRACTICE**—*continued.*

risks undertaken by the former company in various parts of the world. The agreement provided for quarterly settlements of accounts between the two companies. Such settlements accordingly took place every quarter during a period of four years ending in 1908. Company A. brought an action against company B., alleging that they had been unable to obtain settlements of accounts from company B. in respect of business done in subsequent quarters, and claiming an account in respect of such quarters, and payment of the balance, if any, found to be due to them. Company B. thereupon brought a cross-action against company A., asking for inspection of all original documents and vouchers connected with all transactions in which the plaintiffs were interested under the agreement, that all the previously settled accounts between the two companies should be reopened on the ground of errors having occurred therein, and for an account and payment of any moneys found to be due to them after the said accounts had been reopened and taken:—

*Held*, that an order should be made for security for the costs of the cross-action against company B. NEW FENIX COMPAGNIE ANONYME D'ASSURANCES DE MADRID *v.* GENERAL ACCIDENT, FIRE, AND LIFE ASSURANCE CORPORATION, LIMITED - - - - C. A. 619

**3.** —— *Discovery—Interrogatories—Malicious Prosecution—Information upon which Defendants commenced Prosecution—Steps taken by Defendants.*

In an action for malicious prosecution (the plaintiff having been committed for trial and acquitted upon a charge of stealing gas brought against him by the defendants) the plaintiff sought to administer the following interrogatories (among others) to the defendants:—"4. What information (if any) had you that induced you to prosecute the plaintiff for stealing gas? What steps (if any) had you taken before commencing the said prosecution to ascertain whether the charge was true or not? What grounds (if any) had you for supposing that the plaintiff had committed the offence charged? Did you before you commenced the said prosecution take any and what precautions or make any and what inquiries as to the truth of the said charge, and what was the result of each such inquiry? 5. What are the facts and circumstances on which you rely as shewing that you had reasonable and proper cause for the said prosecution?" Both interrogatories were disallowed by the Master and judge in chambers:—

*Held* (by the Full Court of Appeal), that the fifth interrogatory ought not to be allowed.

*Held* (by Cozens-Hardy M.R., Vaughan Williams L.J., Fletcher Moulton L.J., Farwell L.J., and Buckley L.J., Kennedy L.J. dissenting), that, in the absence of special circumstances, such an interrogatory as the fourth interrogatory ought not to be allowed in an action for malicious prosecution, in which class of action there were special reasons for caution in allowing interrogatories to be administered to a defendant. MAASS *v.* GAS LIGHT AND COKE COMPANY - - C. A. 543

**PRACTICE**—*continued.*

4. —— *Foreign Corporation — Service of Writ within the Jurisdiction — Business in England — Agent's Office — "Head Officer"— Rules of the Supreme Court, Order IX., r. 8.*

The defendants were a foreign corporation carrying on business as manufacturers in Germany. They employed a sole agent for the United Kingdom, who rented an office in London and was paid a commission on orders obtained by him for the defendants' goods. The agent also had authority to enter into contracts for the sale of the defendants' goods without submitting the orders to the defendants. Deliveries in fulfilment of orders obtained or contracts made by him were made in some cases out of goods of the defendants lying at wharves in London and in other cases out of a stock of the defendants' goods kept at the agent's office. Goods so delivered were paid for by cheques sent by the purchasers to the agent. The agent also acted for another foreign firm :—

*Held*, that the defendants were carrying on their business at the agent's office so as to be resident at a place within the jurisdiction, and that the agent could, therefore, be properly served with a writ there, as the "head officer" of the defendants within Order IX., r. 8, in an action brought by the plaintiffs against the defendants for breach of an agreement. SACCHARIN CORPORATION, LIMITED *v.* CHEMISCHE FABRIK VON HEYDEN AKTIENGESELLSCHAFT - - - - - - - **C. A. 516**

5. —— *Inspection of Documents—Privileged Documents — Right of Parochial Elector to inspect—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 58, *sub-s.* 5.

By s. 58, sub-s. 5, of the Local Government Act, 1894, "Every parochial elector of a parish in a rural district may at all reasonable times without payment inspect and take copies of and extracts from all books, accounts, and documents belonging to or under the control of the district council of the district."

A parochial elector of a parish in a rural district having threatened litigation against the council of the district, the council took the opinion of counsel as to their liability. The parochial elector claimed a right under the above section to inspect the case submitted to counsel and his opinion thereon :—

*Held*, that the case and opinion were "documents" within the meaning of the section, but that under the circumstances the Court would not enforce the parochial elector's right of inspection by mandamus. THE KING *v.* GODSTONE RURAL DISTRICT COUNCIL **Div. Ct. 465**

6. —— *Writ of Summons — Indorsement of Date of Service within three Days—Proceedings by Default—Non-compliance with Rule—Rules of the Supreme Court, Order IX., r.* 15.

A writ of summons having been served, the date of service was not indorsed thereon within three days as required by Order IX., r. 15. The plaintiff subsequently signed judgment in default of appearance, and a verdict for damages was given by a jury in the sheriff's court :—

**PRACTICE**—*continued.*

*Held*, that non-compliance with Order IX., r. 15, was not an irregularity which could be waived, and that the plaintiff, not having complied with the rule, was not entitled to proceed by default, and that the judgment and verdict must, therefore, be set aside. HAMP-ADAMS *v.* HALL - - - - - - - **C. A. 942**

—— Counter-claim — Adding party — Alternative causes of action - - - **100**
*See* COUNTY COURT. 3.

—— Pleading—Public Authorities Protection Act—Statute of Limitations - **556**
*See* COUNTY COURT. 4.

**PRINCIPAL AND AGENT**—*Authority of Agent —Fraud of Agent—Liability of Principal.*

The defendant, a solicitor, employed a clerk under an agreement in writing as his "conveyancing manager" and "generally as the managing clerk of the employer in the business of solicitor carried on by the latter." The plaintiff went to the defendant's office, and there saw the managing clerk, whom she consulted as to her investments, with which she was dissatisfied. Acting upon his advice, she handed to him the title deeds of certain freehold property and also a mortgage to secure advances made by her upon certain other property, and she also executed a conveyance into the managing clerk's name of the legal estate in the freehold and a transfer of the mortgage to him. The managing clerk deposited the deeds of the freehold property as security for an advance to himself, which he retained for his own private use, and called in the mortgage of the other property and misappropriated the money. The defendant was ignorant of the whole transaction until after the discovery of his clerk's fraud ; the plaintiff believed throughout that she was a client of the defendant :—

*Held* by Farwell and Kennedy L.JJ., that in taking into his own name a conveyance of the plaintiff's freehold property and a transfer of her mortgage the managing clerk was not acting within the scope of his authority as managing clerk of the defendant, and that the defendant was not liable to recompense the plaintiff for the loss sustained by her through the fraudulent act of the managing clerk.

*Held* by Vaughan Williams L.J., that upon the facts there was evidence of such a holding out by the defendant of the managing clerk as being authorized to act on his behalf as would estop the defendant from denying the authority of his managing clerk to deal with the plaintiff's deeds, and that there should in the circumstances be a new trial. LLOYD *v.* GRACE, SMITH & CO. **C. A. 489**

—— Banker—Account opened by principal in name of agent—Revocation of agent's authority to draw on account—Liability of banker to pay undrawn balance to principal - - - - - **1024**
*See* BANKER.

**PRIVILEGE**—Inspection of documents—Privileged documents—Right of parochial elector to inspect - - - **465**
*See* PRACTICE. 5.

**PROOF**—Bankruptcy.
*See* under BANKRUPTCY.

**PUBLIC AUTHORITIES PROTECTION ACT**—Practice—Pleading—Statute of Limitations - - - - - - - **556**
*See* COUNTY COURT. 4.

**PUBLIC HEALTH**—Offences.
*See* under LOCAL GOVERNMENT.

**PUBLIC OFFICE**—Membership of committee—Power of member to resign - - **458**
*See* CORPORATION. 2.

**PURCHASER**—Restrictive covenant—Purchaser for value without notice—Subsequent purchaser with notice — Constructive notice - - - - - - - **473**
*See* COVENANT.

**QUALIFICATION** — Municipal corporation — Mayor and alderman - - - **953**
*See* CORPORATION. 1.

**RAILWAY** — Trespass — Public highway along railway—Dedication by railway company - - - - - - - **314**
*See* JUSTICES.

**RATES**—*Poor Rate—Exclusive Occupation—Power of Mersey Docks and Harbour Board to grant "Demise" of Premises—Bonded Warehouse—Privileges reserved to Mersey Docks and Harbour Board in respect of Machinery on demised Premises—Mersey Dock Acts Consolidation Act*, 1858 (21 & 22 *Vict. c. xcii.*), *ss.* 64, 80, 82—*Mersey Docks (Corporation Purchase) Act*, 1861 (24 & 25 *Vict. c. clxxxviii.*), *s.* 39.

The Mersey Docks and Harbour Board have power to part with the exclusive possession of their premises for purposes not inconsistent with their special Acts so as to create a rateable occupation in the grantee.

By an indenture of lease the Dock Board demised to the respondents certain sections of the vault at Wapping Dock warehouses together with a portion of the quay floor of the warehouses for a term of seven years for use only as a bonded warehouse. The lease provided that the respondents were to pay all rates and taxes; to keep the inside of the premises and all erections, fixtures, and fittings thereon other than certain hydraulic and other plant and machinery belonging to the Board in good and tenantable repair; that they were not to assign or sub-let or part with the possession of the premises without the consent of the Board in writing; and that they were to permit the Board at all reasonable times to enter the premises to view the condition thereof or to repair the Board's plant and machinery. It also provided that the respondents might make alterations in the premises for the purposes of their business in accordance with plans approved by the Board's engineers, but prohibited them from storing any goods at any time over certain pipe trenches or machinery pits.

It was also provided that the respondents would not store any goods or do anything in or about the demised premises which should in the judgment of the Board be likely to cause danger or injury to the premises or other property or which might in its judgment be offensive or a nuisance, and that they would not use fires and lights on the premises except in accordance with the Board's by-laws under such arrangements as might be made by the Board's chief warehouse manager, and would pay a tonnage rate to the Board on goods lifted by the cranes at the demised premises, and that they would pay for the attendance of the Board's officers and any other expenses which might be incurred for any period during which the demised premises might be kept open before or after ordinary business hours, and further that the use of the premises "shall be so worked by the company as not to cause any interference with or obstruction to the general working of the dock estate and that the servants of the Board shall at all reasonable times have free access thereto for the purpose of such general working."

The premises comprised in the lease were wholly within the dock walls and access to them could only be obtained by passing through gates and over land under the absolute control of the Board. They were separated from the remaining portion of the warehouses and quay floor by solid brick walls. The entrance to and egress from the premises was by a door on which there were two locks, the key of one being kept by the Customs and that of the other by the respondents. For the door to be opened it was necessary that both keys should be used, and without the co-operation of the Customs and the respondents the door could not be opened, but the Board had the right of access to the premises through the door at all reasonable times. The door opened on to the quay floor, and from there access to the vault floor was obtained by means of a circular iron staircase leading downwards from the centre of the quay floor. A hydraulic main ran down the centre of the vaults, and on each side of the vaults were twelve machinery pits. The machinery in the pits worked a number of cranes and lifts belonging to the Board, of which one crane and one lift only were in the premises demised to the respondents, who paid for their use a tonnage rate to the Board on goods lifted. The working of these cranes and lifts made it necessary that one or more of the employees of the Board should go down into the vaults several times a day and stay there for periods ranging from ten minutes to the whole day according to the amount of work to be done. The respondents had to leave for the use of the Board and persons authorized by them free access to the hydraulic mains and machinery, and to secure such access an alleyway had to be always kept clear of goods. The respondents having been rated to the poor rate in respect of the premises:—

*Held*, that they were rightly rated as occupiers inasmuch as a grant by the Board of exclusive occupation of the premises to the respondents for the purposes of a bonded warehouse was not inconsistent with the purposes for which the Board was constituted or with the performance of its statutory powers and duties. The word

**RATES**—*continued.*
"demise" used in the lease prima facie imported a grant of exclusive occupation. The nature of the respondents' business was not consistent with anything but exclusive occupation subject to the control of the Customs authorities, and the privileges given to the Board were only occasioned by the fact that there was upon the demised property machinery which the Board wished to utilize during the term.

*Allan* v. *Liverpool Overseers* and *Inman* v. *Kirkdale Overseers* (1874) L. R. 9 Q. B. 180, and *Rochdale Canal Co.* v. *Brewster* [1894] 2 Q. B. 852, distinguished. YOUNG & Co. *v.* LIVERPOOL ASSESSMENT COMMITTEE - - **Div. Ct. 195**

**2.** ——*Quinquennial Valuation—Provisional List—"Subsequently made"—Valuation (Metropolis) Act*, 1869 (32 *&* 33 *Vict. c.* 67), *s.* 47, *sub-ss.* 8, 10.

A valuation list is not "made" within s. 47, sub-s. 8, of the Valuation (Metropolis) Act, 1869, until it is finally approved by the assessment committee.

The plaintiff was the occupier of licensed premises within the defendants' borough, and in the quinquennial valuation list of 1905 his property was assessed at gross value 400*l.*, rateable value 334*l.* After the Finance (1909-10) Act, 1910, was passed the value of the premises was diminished, and they were inserted in a provisional list made under s. 47 of the Valuation (Metropolis) Act, 1869, at gross value 319*l.*, rateable value 266*l.* A copy of this list was served on the plaintiff on June 30, 1910, and the list thereupon came into operation. In the quinquennial valuation list made in 1910, which was sealed by the defendants on May 30 and finally approved by the assessment committee on October 31, 1910, the premises were assessed at 180*l.* gross and 150*l.* rateable value. This list came into force on April 6, 1911 :—

*Held*, that the quinquennial list was "made" when it was finally approved ; that it was therefore "made" subsequently to the provisional list ; that under s. 47, sub-s. 8, the provisional list ceased to be operative on April 6, 1911 ; and that the plaintiff was entitled to be rated on 150*l.* only and to have the amount overpaid by him repaid. PARRISH *v.* HACKNEY CORPORATION - - - - - **Warrington J. 822**

—— Water rate.
*See* under WATER.

**RECEIVER**—Judgment debt—Stay of execution—Bankruptcy notice—Appointment of receiver by way of equitable execution
*See* BANKRUPTCY. 5. **988**

**RECEIVING ORDER**—Bankruptcy—"Sufficient cause" for refusal of receiving order—Secret arrangement—Extortion - **658**
*See* BANKRUPTCY. 6.

**REGISTRAR**—County court — Registrar not barrister of seven years' standing—Validity of appointment of registrar as deputy judge - - - - - **432**
*See* COUNTY COURT. 1.

**REGISTRATION OF VOTERS**—Vestry clerk—Duties - - - - - - **669**
*See* VESTRY CLERK.

**REMOTENESS**—Damages, Measure of—Breach of contract—Inassessability - **786**
*See* DAMAGES.

**RENT** — Res judicata — Action for rent due under agreement—Judgment for sum admittedly due — Second action — Defence, no consideration for agreement - - - - - - **1125**
*See* ESTOPPEL.

**REPAIRS**—Highway.
*See* under HIGHWAY.

—— Long lease—Repairing covenant—Breach—Waste—Relief against forfeiture **234**
*See* LANDLORD AND TENANT.

**REPRESENTATION OF THE PEOPLE.**
*See* under PARLIAMENT.

**REPRESENTATION OF THE PEOPLE ACT, 1884** - - - - - - - **669**
*See* VESTRY CLERK.

**RESIGNATION**—Public office—Obligation of appointee to serve — Membership of committee — Power of member to resign - - - - - - **458**
*See* CORPORATION. 2.

**RES JUDICATA**—Action for rent due under agreement — Judgment for rent admittedly due—Second action—Defence, no consideration for agreement - **1125**
*See* ESTOPPEL.

**RESTRICTIVE COVENANT.**
*See* under COVENANT.

**REVENUE**—*Estate Duty—Gift inter vivos—Entire Exclusion of Donor—Benefit to him by Contract or otherwise—Donor allowed to reside in Property granted—Customs and Inland Revenue Act*, 1881 (44 *&* 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*a*)—*Customs and Inland Revenue Act*, 1889 (52 *&* 53 *Vict. c.* 7), *s.* 11, *sub-s.* 1—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*).

By s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, the description of property required to be included in an account and made subject to duty under s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act, 1881, and therefore to estate duty under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, "shall include property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

The owner of a farm and dwelling-house thereon by a deed of gift in 1897 in consideration of natural love and affection conveyed and assigned the farm, with the dwelling-house and other buildings and the live and dead stock and the other chattels thereon, to the defendant, his great-nephew, who resided with him, and who had in the preceding year taken over the management of the farm. The donor had no property other than that included in the deed,

**REVENUE**—*continued.*

except an annuity of 15*l.* chargeable upon certain land belonging to the defendant. After the execution of the deed the donor continued to reside in the house until his death in 1906, and was maintained by the defendant, who retained the annuity, which was sufficient to meet the cost of his maintenance, but there was no agreement or understanding between the donor and the defendant that the former should be permitted to remain in the house or be maintained by the defendant. Upon the death of the donor the Crown claimed estate duty upon the value of the property comprised in the deed upon the ground that bona fide possession and enjoyment of the property were not assumed by the donor and thenceforward retained "to the entire exclusion of the donor, or of any benefit to him by contract or otherwise":—

*Held*, that, though the donor was permitted by the donee to and did in fact reside in the house from the date of the deed until his death, there was an entire exclusion of the donor from the possession and enjoyment of the property or of any benefit to him by contract or otherwise, within the meaning of the section, and that therefore estate duty was not payable.

The words "or otherwise" in the sentence "or of any benefit to him by contract or otherwise" must be read as meaning some arrangement ejusdem generis with contract, that is to say, an enforceable arrangement.

*Lord Advocate* v. *Stewart* (1906) 8 F. 579, followed. ATTORNEY-GENERAL *v.* SECCOMBE **Hamilton J. 688**

**2.** —— *Income Tax—Average Profits and Gains—Deduction—Patent—Royalty—Royalty ceasing to be payable—Finance Act*, 1907 (7 *Edw.* 7, *c.* 13), *s.* 25, *sub-s.* 1.

The provision in s. 25 sub-s. 1, of the Finance Act, 1907, that "in estimating under any schedule of the Income Tax Acts, the amount of the profits and gains arising from any trade, manufacture . . . . no deduction shall be made on account of any royalty, or other sum, paid in respect of the user of a patent" does not apply where, by arrangement between the person owning and the person using the patent, all royalties and other sums in respect of the user thereof have ceased to be payable before the year of assessment

Decision of Hamilton J. [1911] 2 K. B. 15, reversed. LANSTON MONOTYPE CORPORATION, LIMITED *v.* ANDERSON - - - **C. A. 1019**

**3.** —— *Income Tax—Company—Foreign Investments—Interest of, not remitted home—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *Sched. D, First Case—Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

A fire and life insurance company which carried on business both at home and abroad was registered in this country, and had its head office and board of direction here. By the laws of certain of the foreign countries in which it so carried on business an insurance company was required, as a condition of permission to carry on business there, to deposit with the Governments of those countries certain sums of money and to invest those sums in accordance with the local laws. In pursuance of those requirements

**REVENUE**—*continued.*

the company invested certain sums in those countries. It also voluntarily invested there certain other sums representing accumulated profits of its business. Both classes of investments yielded interest which was received by the company abroad, but was not remitted to the United Kingdom:—

*Held*, that the interest on both classes of investments was part of the profits or gains accruing to the company from the trade of insurance carried on by it, and was assessable to income tax under the first case of Sched. D. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY *v.* BENNETT **Hamilton J. 577**

**4.** —— *Income Tax—Trustees for Charitable Purposes—Allowances—Rents and Profits—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *Sched. A*, *s.* 61, *No. VI.*

Trustees for charitable purposes, or a charitable corporation, not being a college or hall, hospital, public school or almshouse, are not entitled to the allowances for income tax under Sched. A given by s. 61, No. VI., of the Income Tax Act, 1842, in respect of lands, tenements, hereditaments or heritages in their own occupation not producing rents.

Sums received by the trustees for the use of the property and wholly expended in its upkeep are not "rents and profits" within the meaning of this section.

*Maughan* v. *Free Church of Scotland* (1893) 30 Sc. L. R. 666, followed and approved. THE KING *v.* SPECIAL COMMISSIONERS OF INCOME TAX. *Ex parte* ESSEX HALL - - **C. A. 434**

**5.** —— *Licence—Hackney Carriage—What constitutes "keeping" a Carriage—Customs and Inland Revenue Act*, 1869 (32 *&* 33 *Vict. c.* 14), *s.* 27.

By s. 27 of the Customs and Inland Revenue Act, 1869, "Every person who . . . . shall keep a greater number of carriages . . . . than he shall be authorised to . . . . keep by any licence or licences" granted to him under that Act shall be liable to a penalty:—

*Held*, that a cab proprietor who has in reserve in his yard a number of spare cabs ready for use and intended to be used if and when occasion requires does not "keep" them within the meaning of that section until he in fact begins to use them. LONDON COUNTY COUNCIL *v.* FAIRBANK - - - - - **Div. Ct. 32**

**6.** —— *Stamp—Lease for a fixed Term of Years if certain Persons should so long live—Contingency of Lives dropping within the Term—Indefinite Term—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *Sched. I.*

A lease for a term of ninety-nine years if A., B., and C. should so long live is a lease for a term which "exceeds thirty-five years," and not a lease for an "indefinite" term, within the meaning of Sched. I. to the Stamp Act, 1891. EARL OF MOUNT EDGCUMBE *v.* INLAND REVENUE COMMISSIONERS - **Hamilton J. 24**

**7.** —— *Stamp—Marketable Security—Instrument for Disposition of Interest or Property in Ship—Debenture purporting to create*

**REVENUE**—*continued.*

*Charge on Ships—Previous Legal Mortgage of same Ships to Trustees—Trust Deed declaring that Legal Mortgage was held in trust for the Debenture-holders—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *First Schedule, General Exemptions from all Stamp Duties, clause* 2.

A company issued a debenture bond for 1000*l.* and interest which was a marketable security within the meaning of the First Schedule to the Stamp Act, 1891. The debenture was one of a series protected by a trust deed. It purported to create a charge upon three ships belonging to the company. These ships had previously been mortgaged by legal mortgages registered under the Merchant Shipping Acts to trustees for the debenture-holders. The trust deed contained covenants for payment of principal and interest and provisions for the maintenance and realization of the security usual in trust deeds. The debenture provided that the holder should have the benefit pari passu with other debenture-holders of the mortgages :—

*Held*, that the debenture bond did not create any charge on the ships beyond that already in existence, and that if it did create any charge its substantial object was to create not a charge but a marketable security, and it was therefore not an instrument for the disposition of a ship within clause 12 of the General Exemptions from all Stamp Duties contained in the First Schedule to the Stamp Act, 1891, but was liable to stamp duty as a marketable security under the same schedule.

Decision of Hamilton J., [1911] 1 K. B. 1078, affirmed. DEDDINGTON STEAMSHIP COMPANY *v.* INLAND REVENUE COMMISSIONERS
C. A. 1001

8. —— *Stamp Duty—Settlement—Policy of Life Insurance — Covenant for Payment of Premiums—Provision for keeping up Policy—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 104.

Where money to become due or payable under a policy of life insurance was "settled" by an instrument dated in 1894, which contained no provision for keeping up the policy, but the policy was in fact protected by a covenant, still applicable, for the payment of the premiums, such covenant being contained in a previous instrument executed when the policy was effected in 1892 :—

*Held*, that provision was "made for keeping up the policy" within the meaning of the proviso 2 (*a*) to s. 104 of the Stamp Act, 1891, and that, for the purpose of stamping the instrument of 1904, the ad valorem duty was chargeable in respect of the full amount of the policy moneys, and not only on the value of the policy at the date of the instrument.

It is not necessary for the purpose of the sub-section that the provision should be contained in the particular instrument which is sought to be charged with duty.

Decision of Hamilton J. on this point, [1911] 2 K. B. 343, reversed. DUKE OF NORTHUMBERLAND *v.* INLAND REVENUE COMMISSIONERS
C. A. 1011

**REVENUE**—*continued.*

—— Income tax—Bankruptcy notice—Validity —"Yearly interest" - - - 550
*See* BANKRUPTCY. 2.

**ROYALTY**—Income tax—Average profits and gains — Deduction — Patent — Royalty ceasing to be payable - - - 1019
*See* REVENUE. 2.

—— Patent.
*See* under PATENT.

**RULES OF THE SUPREME COURT, Order IX., r. 8**—*Service of Writ of Summons.* 516
*See* PRACTICE. 4.

—— —— **r. 15** - - - - - - 942
*See* PRACTICE. 6.

—— **Order XL., rr. 6, 6a**—*Motion for Judgment*
*See* INTERPLEADER. 611

—— **Order LVII., rr. 7, 11, 13**—*Interpleader*
*See* INTERPLEADER. 611

**SALE**—Food and drugs—Adulteration.
*See* under ADULTERATION.

**SALE OF GOODS**—*C.f.i. Contract—Policy handed over with Goods—Honour Policy on Increased Value—Right of Buyer to Policy.*

The defendants bought a cargo of wheat at a price to cover cost, freight, and insurance under a contract which contained the clause "Seller to give policies of insurance (free of war risk) for 2 per cent. over the invoice amount, and any amount over this to be for seller's account in case of total loss only." In order to fulfil the contract the seller bought a cargo of wheat from a person to whom the plaintiff had sold it, the contracts throughout being in the same form and containing the above clause. The plaintiff handed over to the buyer from him a policy for 2 per cent. over the invoice amount, and this policy was handed over to the defendants in due course. The plaintiff, before selling the cargo, had taken out an honour policy on increased value of the wheat for his own benefit, which policy he retained in his own possession. A loss having occurred, the underwriters paid the defendants the full amount under the policy which had been handed over to them. The plaintiff then sent the increased value policy to the defendants, requesting them to collect from the underwriters the amount payable thereunder. The defendants did so, and upon being paid the amount by the underwriters they claimed to retain it upon the ground that under the contract of sale the plaintiff was bound to hand over all policies effected on the wheat at the time when he entered into the contract of sale. In an action by the plaintiff to recover the amount as money had and received to his use :—

*Held*, that, as the increased value policy was an independent honour policy effected by the plaintiff for his own benefit, the defendants were not entitled to it under the contract, and that the plaintiff was entitled to recover the amount received by the defendants thereunder as money had and received to his use.

**SALE OF GOODS**—*continued.*

*Ralli* v. *Universal Marine Insurance Co.* (1862) 4 D. F. & J. 1, and *Landauer* v. *Asser* [1905] 2 K. B. 184, discussed. STRASS *v.* SPILLERS & BAKERS, LIMITED **Hamilton J. 759**

2. —— *Market Overt—Custom of the City of London—Shop—Auction Room—Detinue—Trover—Demand and Refusal before Writ.*

The plaintiff's watch, which had been bought some years previously at the defendant's shop, was stolen from the plaintiff, who gave information of the theft to the defendant. The watch was pledged with a pawnbroker, and eventually, together with a large number of other unredeemed pledges, was sold by auction in a room on the first floor of a building in the city of London, which room was used solely for the sale by auction of the goods of third persons. Shortly afterwards the watch was purchased in a jeweller's shop in the country by one B., who sent it to the defendant for an opinion as to whether it was a genuine antique watch. The defendant wrote both to the plaintiff and to B., telling them that it was the watch which had been stolen, and inquiring as to their wishes in the matter. No answer was sent by the plaintiff to the defendant's letter, but a few days afterwards a clerk of the plaintiff's solicitors called at the defendant's shop and, on being shewn the watch, demanded that it should be then and there handed over to him, and, on this request being refused, at once served the defendant with a writ in detinue which he had taken out on behalf of the plaintiff about two hours previously :—

*Held* by Scrutton J., that the auction room was not a shop within the meaning of the custom of the city of London, according to which a sale in a shop in that city of such goods as are usually sold in it is a sale in market overt.

*Held* by the Court of Appeal (Fletcher Moulton L.J. and Farwell L.J., Vaughan Williams L.J. dissenting), without deciding the question of market overt, that upon the facts given in evidence there had been no wrongful refusal on the part of the defendant to return the watch to the plaintiff before the date of the issue of the writ, and that the plaintiff had no cause of action against the defendant either in detinue or in trover. CLAYTON *v.* LE ROY **C. A. 1031**

**SALMON FISHERY.**

*See* under FISHERY ACTS.

**SATISFACTION**—Sum offered by a third party in satisfaction of a debt—Effect of acceptance by creditor - - **330**

*See* ACCORD AND SATISFACTION.

**SCHOOLS**—*Negligence—Elementary Education—Local Education Authority—Provided School—Negligent Act of Teacher—Injury to Scholar—Relation of Master and Servant—Liability of Education Authority.*

The plaintiff, a girl aged about fourteen, attended a public elementary school provided by the defendant corporation, who were the local education authority for the district. The teachers in the school were appointed and paid, and were liable to be dismissed, by the defendant corporation. A teacher (who was joined as a defendant in the action) directed the plaintiff during school hours to poke the fire and draw out the damper of a stove in the teachers' common room, where the teacher proposed to have her lunch. While the plaintiff was carrying out the order her pinafore caught fire and she was seriously burned. At the trial the jury found that the act of the teacher was negligent, and the judge and the Court of Appeal held that there was evidence to support the finding. The judge, after argument, directed judgment to be entered for the defendant corporation, and the plaintiff appealed :—

*Held*, first, that the relation of master and servant existed between the local education authority and the teachers employed by them ; and, secondly, that the act of the teacher was within the scope of her employment, which was not strictly confined to teaching alone ; and that therefore the defendant corporation was liable to the plaintiff for the consequences of the teacher's negligent act. SMITH *v.* MARTIN AND KINGSTON-UPON-HULL CORPORATION **C. A. 775**

2. —— *Non-attendance of Child at Public Elementary School—Reasonable Excuse—Efficient Instruction in some other Manner—Standard of Efficiency—Jurisdiction of Justices to decide whether Education efficient—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 74—*Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79).

By a by-law made under s. 74 of the Elementary Education Act, 1870, as amended by the Education Acts, 1876 to 1902, it was provided "that the parent of every child of not less than five years or more than fourteen shall cause such child to attend school unless there be a reasonable excuse for non-attendance," and that the following reason (inter alia) should be a reasonable excuse, namely, "that the child is under efficient instruction in some other manner."

An information was laid charging a parent with having unlawfully and without reasonable excuse neglected and omitted to cause his child to attend school as required by the by-law. The parent had arranged with a lady for the education of the child, and the justices found as a fact that the education the child was receiving was efficient and dismissed the information upon that ground :—

*Held*, that the justices had jurisdiction to decide that the education the child was receiving was efficient without deciding that it was as efficient as he would have received at a public elementary school. BEVAN *v.* SHEARS **Div. Ct. 936**

3. —— *Non-provided School—Duty to maintain and keep efficient—Appointment of Caretaker—Management of School—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.

The duty of seeing that a non-provided public elementary school is kept clean and properly cared for is, by s. 7, sub-s. 1, of the Education Act, 1902, cast primarily upon the local education authority. The right to appoint the cleaners and caretakers of a non-provided school is there-

**SCHOOLS**—*continued.*
fore vested in the local authority, and not in the managers, whose duty in respect of seeing to the cleansing of a non-provided school under the powers of management conferred upon them by s. 7, sub-s. 7, of that Act arises only by way of supplement and assistance to the local education authority.

So *held* by Fletcher Moulton L.J. and Farwell L.J. (Vaughan Williams L.J. dissenting).

Decision of Hamilton J., [1911] 1 K. B. 222, reversed. GILLOW *v.* DURHAM COUNTY COUNCIL - - - - - - **C. A. 1074**

**SEAMAN**—Distressed seaman — Illness being venereal disease—Expenses of necessary medical and surgical advice and maintenance—Liability of shipowner - **225**
*See* SHIPPING. 6.

**SERVANT**—Employer and workman.
*See* under EMPLOYER AND WORKMAN.

—— Master and servant.
*See* under MASTER AND SERVANT.

**SERVICE**—Writ of summons—Indorsement of date of service within three days—Proceedings by default—Non-compliance with rule - - - - - **942**
*See* PRACTICE. 6.

**SETTLEMENT**—Stamp duty — Policy of life insurance—Covenant for payment of premiums—Provision for keeping up policy - - - - - - **1011**
*See* REVENUE. 8.

**SHERIFF**—*Fees—Fieri Facias—Liability of Execution Creditor—"Person at whose instance the sale is stopped"—Company being wound up voluntarily—Stay of Execution on Application of Liquidator—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 184, 186, 193—*Sheriffs Act*, 1887 (50 *&* 51 *Vict. c.* 55), *s.* 20, *sub-s.* 2—*Order as to Fees of August* 31, 1888.

By the Order as to Fees made under s. 20, sub-s. 2, of the Sheriffs Act, 1887, a sheriff may demand, take, and receive certain fees for executing writs of fi. fa., the fees to be levied in every case in which an execution is completed by sale as fees payable to sheriffs were levied before the making of the Order; and "in every case where an execution is withdrawn, satisfied, or stopped, the fees under this Order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be."

After a resolution for the voluntary winding-up of a company certain goods of the company were seized by the sheriff under a writ of fi. fa. in execution of a judgment recovered against the company before the commencement of the winding-up. Upon the application of the liquidator of the company, the Court made an order restraining the execution creditor from selling the goods or further proceeding upon the judgment, and by a subsequent order directed the sheriff to withdraw, but made no order as to payment of the sheriff's fees. In an action by the sheriff against the execution creditor to recover his fees, the latter contended that under

**SHERIFF**—*continued.*
the Order as to Fees of August 31, 1888, the liquidator alone was liable as the person at whose instance the sale was stopped:—

*Held*, that the execution creditor, as the person who had issued the execution, and not the liquidator, was liable to pay the sheriff's fees.

The Order as to Fees of August 31, 1888, has merely fixed the scale of fees payable to the sheriff, and has not altered the law as to the liability to pay them.

"The person at whose instance the sale is stopped" refers to the case of the official receiver or trustee in bankruptcy of a judgment debtor who requires the sheriff, under s. 11, sub-s. 1, of the Bankruptcy Act, 1890, to hand over to him the goods taken in execution, and thereby stops the sale. MONTAGUE *v.* DAVIES, BENACHI & CO. - - - - - - - **Div. Ct. 595**

**SHIPPING**.—*Distressed Seaman—Illness being Venereal Disease—Seaman left behind from Ship in Place out of United Kingdom—Expenses of necessary Medical and Surgical Advice and Maintenance—Liability of Shipowner—Merchant Shipping Act*, 1906 (6 *Edw*, 7, *c.* 48), *ss.* 32, 34, 35, 41, 42.

Under ss. 41 and 42 of the Merchant Shipping Act, 1906, the Board of Trade on behalf of the Crown is entitled to recover from the owner of a British ship the expenses incurred on behalf of the Crown of maintenance in the sense of board and lodging and conveyance home of a seaman left behind from the ship in a place out of the United Kingdom and in distress in that place, though suffering from venereal disease, but it cannot recover any medical or surgical expenses of the seaman. BOARD OF TRADE *v.* ANGLO-AMERICAN OIL COMPANY, LIMITED
**Scrutton J. 225**

—— Insurance (Marine).
*See* under INSURANCE (MARINE).

—— Stamp — Marketable security—Debenture purporting to create charge on ships—Previous legal mortgage of same ships to trustees - - - - - **1001**
*See* REVENUE. 7.

**SHOOTING RIGHTS** — Extinguishing fire — Actual necessity—Reasonable act **837**
*See* TRESPASS.

**SHOP**—Sale of goods—Market overt—Custom of the city of London—Auction room—Detinue—Trover—Demand and refusal before writ - - - - - **1031**
*See* SALE OF GOODS. 2.

**STAMPS**—Inland Revenue.
*See* under REVENUE.

**STATUTES**:—

1554–5.

1 & 2 Ph. & M. c. 12, s. 1—*Pound* - - **124**
*See* COMMON. 2.

1677.

29 Car. 2, c. 3, s. 4—*Statute of Frauds* - **1056**
*See* CONTRACT. 2.

**STATUTES**—*continued.*

1826.

7 Geo. 4, c. xxx., ss. 19, 156—*Macclesfield Canal* - - - - - - - **528**
*See* HIGHWAY. 3.

1831.

1 & 2 Will. 4, c. 32, s. 30—*Game* - - **90**
*See* GAME.

1836.

6 & 7 Will. 4, c. 37, s. 7—*Bread* - - **562**
*See* BREAD.

1839.

2 & 3 Vict. c. 71, s. 40—*Metropolitan Police Courts* - - - - - **291**
*See* BAILMENT.

1842.

5 & 6 Vict. c. 35, s. 100, Sched. D, first case—*Income Tax* - - - - - **577**
*See* REVENUE. 3.

—— —— Sched. A, s. 61, No. VI. - **434**
*See* REVENUE. 4.

1845.

8 & 9 Vict. c. 109—*Gaming* - - - **981**
*See* BANKRUPTCY. 7.

1847.

10 & 11 Vict. c. 15, s. 8—*Gasworks Clauses*
*See* GAS COMPANY. **565**

1848.

11 & 12 Vict. c. 43, s. 25—*Summary Jurisdiction* - - - - - - - **450**
*See* CRIMINAL LAW. 4.

1850.

13 & 14 Vict. c. 57, ss. 7, 8—*Vestries* - **669**
*See* VESTRY CLERK.

1853.

16 & 17 Vict. c. 34, s. 2, Sched. D—*Income Tax* - - - - - - - - **577**
*See* REVENUE. 3.

1858.

21 & 22 Vict. c. xcii., ss. 64, 80, 82—*Mersey Docks* - - - - - - - **195**
*See* RATES. 1.

1860.

23 & 24 Vict. c. 126, s. 17—*Common Law Procedure* - - - - - - - **611**
*See* INTERPLEADER.

1861.

24 & 25 Vict. c. clxxxviii., s. 39—*Mersey Docks (Corporation Purchase)* - - **195**
*See* RATES. 1.

1865.

28 & 29 Vict. c. 121, s. 36—*Salmon Fishery*
*See* FISHERY ACTS. **271**

**STATUTES**—*continued.*

1866.

29 & 30 Vict. c. 122—*Metropolitan Commons*
*See* COMMON. 1. **854**

1867.

30 & 31 Vict. c. 102, ss. 3, 7—*Representation of the People* - - - - **1102**
*See* PARLIAMENT.

1868.

31 & 32 Vict. c. 119, s. 23—*Regulation of Railways* - - - - - - **314**
*See* JUSTICES.

31 & 32 Vict. c. 121, ss. 15, 17——*Pharmacy*
*See* PHARMACY ACTS. **115**

1869.

32 & 33 Vict. c. 14, s. 27—*Customs and Inland Revenue* - - - - - - **32**
*See* REVENUE. 5.

32 & 33 Vict. c. 41, ss. 3, 4, 19—*Poor Rate Assessment and Collection* - - **1102**
*See* PARLIAMENT.

32 & 33 Vict. c. 62, s. 5—*Debtors Act* - **191**
*See* DEBTORS ACT.

32 & 33 Vict. c. 67, s. 47, sub-ss. 8, 10—*Valuation (Metropolis)* - - **822**
*See* RATES. 2.

32 & 33 Vict. c. 115, ss. 6, 11—*Metropolitan Public Carriage*—Order of Secretary of State dated December 30, 1907, Regulations 1 and 4 - - - **1131**
*See* LONDON. 3.

1870.

33 & 34 Vict. c. 75, s. 74—*Elementary Education* - - - - - - - **936**
*See* SCHOOLS. 2.

1871.

34 & 35 Vict. c. 31, s. 4—*Trade Union* - **132**
*See* TRADE UNION.

1872.

35 & 36 Vict. c. 94, s. 3—*Licensing* - **1**
*See* LICENSING ACTS. 2.

1875.

38 & 39 Vict. c. 55, s. 66—*Public Health* **149**
*See* LOCAL GOVERNMENT. 2.

—— —— ss. 116, 117 - - - - - **391**
*See* LOCAL GOVERNMENT. 3.

—— —— ss. 116, 117, 253 - - - **383**
*See* LOCAL GOVERNMENT. 4.

—— —— s. 158 - - - - - - **361**
*See* LOCAL GOVERNMENT. 5.

38 & 39 Vict. c. 63, s. 20—*Sale of Food and Drugs* - - - - - - **959**
*See* ADULTERATION.

1876.

39 & 40 Vict. c. 79—*Elementary Education*
*See* SCHOOLS. 2. **936**

**STATUTES**—*continued.*

1878.

40 & 41 Vict. c. 26, s. 14; s. 28, sub-ss. 10, 11—*Parliamentary and Municipal Registration* - - - - - - **1102**
*See* PARLIAMENT.

41 & 42 Vict. c. 77, s. 23—*Highways and Locomotives* - - - - - **801**
*See* HIGHWAY. 2.

1881.

44 & 45 Vict. c. 12, s. 38, sub-s. 2 (*a*)—*Customs and Inland Revenue* - - - **688**
*See* REVENUE. 1.

44 & 45 Vict. c. 41, s. 14, sub-ss. 1, 2, 3—*Conveyancing* - - - - - **234**
*See* LANDLORD AND TENANT.

1882.

45 & 46 Vict. c. 50, ss. 12, 14, 15, 73—*Municipal Corporations* - - **953**
*See* CORPORATION. 1.

—— —— s. 22. - - - - - - **458**
*See* CORPORATION. 2.

45 & 46 Vict. c. ccxiv., s. 38—*Great Western Railway (No. 1)* - - - - **314**
*See* JUSTICES.

1883.

46 & 47 Vict. c. 38, s. 2—*Trial of Lunatics*
*See* CRIMINAL LAW. 1. **1144**

46 & 47 Vict. c. 52, s. 4, sub-s. 1 (*g*)—*Bankruptcy* - - - - **718, 988**
*See* BANKRUPTCY. 3, 5.

—— —— s. 7 - - - - - - **658**
*See* BANKRUPTCY. 6.

—— —— s. 25 - - - - - - **309**
*See* BANKRUPTCY. 4.

—— —— s. 37, sub-s. 3 - - - - **652**
*See* BANKRUPTCY. 10.

—— —— s. 44 - - - - - - **705**
*See* BANKRUPTCY. 9.

—— —— ss. 104, 125 - - - - **109**
*See* BANKRUPTCY. 1.

1884.

48 & 49 Vict. c. 3, s. 9, sub-ss. 2, 3—*Representation of the People* - - - **669**
*See* VESTRY CLERK.

1887.

50 & 51 Vict. c. 21, s. 4—*Water Companies (Regulation of Powers)* - - **74**
*See* WATER. 2.

50 & 51 Vict. c. 55, s. 20, sub-s. 2—*Sheriffs* **595**
*See* SHERIFF.

50 & 51 Vict. c. 58, s. 49, r. 30—*Coal Mines Regulation* - - - - - - **162**
*See* EMPLOYER AND WORKMAN. 4.

1888.

51 & 52 Vict. c. 43, s. 18—*County Courts* **432**
*See* COUNTY COURT. 1.

—— —— s. 126 - - - - - - **412**
*See* COUNTY COURT. 5.

**STATUTES**—*continued.*

1889

52 & 53 Vict. c. 7, s. 11, sub-s. 1—*Customs and Inland Revenue* - - - - **688**
*See* REVENUE. 1.

1890.

53 & 54 Vict. c. 59, s. 28—*Public Health* **391**
*See* LOCAL GOVERNMENT. 3.

1891.

54 & 55 Vict. c. 39, s. 104—*Stamps* - **1011**
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54 Vict. c. xxvi.—*Metropolitan Commons (Mitcham) Supplemental* - - **854**
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55 & 56 Vict. c. 9, s. 1—*Gaming* - . **981**
*See* BANKRUPTCY. 7.

55 & 56 Vict. c. 57, s. 10—*Private Street Works* - - - - - - **846**
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56 & 57 Vict. c. 39, s. 25—*Industrial and Provident Societies* - - - **275**
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56 & 57 Vict. c. 61—*Public Authorities Protection* - - - - - - **556**
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56 & 57 Vict. c. 73, s. 46—*Local Government Act*, 1894 - - - - - **9**
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57 & 58 Vict. c. ccxiii., ss. 5, 58—*London Building* - - - - - - **257, 1143**
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60 & 61 Vict. c. 37, Sched. I., par. 12—*Workmen's Compensation* - - - **738**
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61 & 62 Vict. c. 29, s. 12—*Locomotives* - **801**
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61 & 62 Vict. c. 36, s. 1 (*f*)—*Criminal Evidence* - - - - - - - **120**
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62 & 63 Vict. c. 51, s. 20, sub-s. 6—*Sale of Food and Drugs* - - - **832, 959**
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63 & 64 Vict. c. 51, s. 2, sub-s. 1 (*c*)—*Moneylenders* - - - - - **992**
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2 Edw. 7, c. 42, s. 7—*Education* - - **1074**
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4 Edw. 7, c. 23, s. 2—*Licensing* - - **946**
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6 Edw. 7, c. 27, ss. 6, 12—*Fertilisers and Feeding Stuffs* - - - - - - **217**
*See* ADULTERATION.

6 Edw. 7, c. 48, ss. 32, 34, 35, 41, 42—*Merchant Shipping* - - - - - **225**
*See* SHIPPING.

6 Edw. 7, c. 58, s. 1, sub-ss. 1, 2 (*c*)—*Workmen's Compensation* - - - - **747**
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—— —— Sched. II., par. 15 - - - **733**
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7 Edw. 7, c. 13, s. 25, sub-s. 1—*Finance*
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7 Edw. 7, c. 23, s. 3—*Criminal Appeal* - **1144**
*See* CRIMINAL LAW. 1.

7 Edw. 7, c. clxxi., ss. 8, 9, 16, 20, 25—*Metropolitan Water Board (Charges)* - **38**
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—— —— ss. 8, 19 - - - - - - **965**
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8 Edw. 7, c. 55, s. 2—*Poisons and Pharmacy*
*See* PHARMACY ACTS. **115**

8 Edw. 7, c. 69, s. 89—*Companies (Consolidation)* - - - - - - - **648**
*See* COMPANY. 1.

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**STAYING EXECUTION.**
*See* under EXECUTION.

**STOP-COCK BOX**—Liability of householder to repair—Power to break up street for that purpose—Waterworks—Communication pipe - - - - - - **965**
*See* LONDON. 4.

**STREET**—Gas company—Breaking up street—Persons entitled to notice - - **565**
*See* GAS COMPANY.

—— Plan—Approval by local authority—Laying out new street—Restrictive covenant—Impossibility of complying with by-law
*See* LOCAL GOVERNMENT. 5. **361**

**STREETS**—*Private Street Works—Provisional Apportionment—"Access through court, passage, or otherwise"—Local Government—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *s.* 10.

By s. 10 of the Private Street Works Act, 1892, an urban authority about to execute private street works in any street may include in a provisional apportionment of the expenses of the works "any premises . . . . access to which is obtained from the street through a court, passage, or otherwise," and which will in their opinion be benefited by the works :—

*Held*, that there may be included premises access to which is obtained through a private road made primarily for the purpose of giving access thereto, but not premises access to which is obtained through a road which is or is intended for a public street. NEWQUAY URBAN DISTRICT COUNCIL *v.* RICKEARD - - - **Div. Ct. 846**

—— Waterworks—Communication pipe—Stop-cock box—Liability of householder to repair—Power to break up street for that purpose - - - - - **965**
*See* LONDON. 4.

**SUMMARY JURISDICTION.**
*See* under JURISDICTION.

**SUMMONS**—Writ of.
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**SURRENDER**—Requisitions for—Conditions of —Validity - - - - - - **82**
*See* EXTRADITION.

**TENANT**—Landlord and.
*See* under LANDLORD AND TENANT.

**THIRD PARTY**—Sum offered by a third party in satisfaction of a debt—Effect of acceptance by creditor - - - **330**
*See* ACCORD AND SATISFACTION.

—— Warehouseman — Negligence — Notice of claim to bailor—Order by magistrate that goods be delivered to third party—Effect of - - - - - - **291**
*See* BAILMENT.

**TRADE UNION**—*Agreement embodying Substance of Rules—Agreement concerning Conditions of Employment—Agreement for Payment of Penalty—Agreement for Application of Funds to provide Benefit—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4.

By s. 4 of the Trade Union Act, 1871, it is enacted that nothing in the Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing (1.) any agreement between members of a trade union concerning the conditions on which any members of such trade union shall be employed ; (2.) any agreement for the payment by any person of any penalty to a trade union ; (3) any agreement for the application of the funds of a trade union to provide benefits to members.

The defendant was a member of a friendly society registered under the Trade Union Acts, 1871 and 1876. By one of the rules of the society

**TRADE UNION**—*continued.*

a member meeting with an accident and becoming totally incapacitated from following his employment for the remainder of his life was entitled to receive the sum of 100*l.*; and all members receiving such a benefit were obliged to sign an agreement that in the event of their returning to their trade they would refund to the society the amount of accident benefit received. If a member failed to refund, certain officers of the society were empowered to institute legal proceedings for the recovery of the amount received.

The defendant, having met with an accident and being apparently incapacitated for life from following his employment of a moulder in an iron foundry, made a claim and received from the society a sum of 100*l.* On receipt of that sum he signed an agreement that in case he should at any time thereafter resume work as an ironfounder he would forthwith pay to the society the sum of 100*l.*, and that in case that sum was not repaid within a period named, certain officers of the society should have power to sue and proceed against him in any Court of competent jurisdiction for the said sum.

The defendant was able to resume work as an ironfounder within the meaning of the agreement. In an action by the officers of the society against the defendant to recover the sum of 100*l.* under the agreement:—

*Held*, that the agreement was neither (1.) an agreement concerning the conditions on which a member of a trade union should be employed; nor (2.) an agreement for the payment of a penalty; nor (3.) an agreement for the application of the funds of a trade union to provide a benefit to a member, within the meaning of s. 4 of the Act.

*Held*, therefore, that the action was maintainable. BAKER *v.* INGALL - **Div. Ct. 132**

**TRESPASS**—*Justification—Act done in Preservation of Property—Shooting Rights—Extinguishing Fire—Actual Necessity—Reasonable Act.*

If a fire breaks out on land, the tenant of the sporting rights is entitled to adopt such means on the land for extinguishing the fire as may in the circumstances be necessary for the preservation of his sporting rights. But to justify a trespass the intervention of the tenant must be actually necessary for the preservation of his game; it is not sufficient to justify a trespass that a reasonable man should think the intervention necessary, if in fact it was not necessary. COPE *v.* SHARP (No. 2) - - **Div. Ct. 837**

—— Game—Trespass in pursuit of—Absence of personal entry - - - **90**
*See* GAME.

—— Public highway along railway—Dedication by railway company - - - **314**
*See* JUSTICES.

**TRESPASSER**—Highway—Nuisance—Defective area railing—Nuisance due to act of trespasser - - - - - **633**
*See* HIGHWAY. 1.

**TROVER**—Market overt—Custom of the city of London — Shop — Auction room — Detinue—Demand and refusal before writ - - - - - - **1031**
*See* SALE OF GOODS. 2.

**TRUSTEE IN BANKRUPTCY.**
*See* under BANKRUPTCY.

**TURBARY**—Rights of common—Estovers—Common appurtenant—Ancient house—Destruction—New house in continuance of ancient house - - - **888**
*See* COMMON. 3.

**VALUATION**—Rates.
*See* under RATES.

**VESTRY CLERK** — *Duties — Registration of Voters—Returns as to Inhabitant Occupiers of Dwelling-houses—Expense of testing Accuracy of Returns—"To make out lists of voters"—Mandamus to Overseers to pay Salary—Vestries Act*, 1850 (13 *&* 14 *Vict. c.* 57), *ss.* 7, 8—*Representation of the People Act*, 1884 (48 *&* 49 *Vict. c.* 3), *s.* 9, *sub-ss.* 2, 3.

A writ of mandamus will lie to the overseers of the poor of a parish commanding them to pay to the vestry clerk of the parish the arrears of his salary due under s. 8 of the Vestries Act, 1850, such salary being made chargeable upon and payable out of the moneys to be raised for the relief of the poor.

It is not part of the duties of a vestry clerk under s. 7 of the Vestries Act, 1850, to verify, by canvassing or otherwise, the accuracy of the returns made, under s. 9, sub-ss. 2 and 3, of the Representation of the People Act, 1884, by the owners or other persons rated or liable to be rated in respect of any hereditament which comprises any dwelling-house within the meaning of the Representation of the People Acts, of the name of the occupier of any such dwelling-house for the purpose of entering the names of such occupiers in the rate-book. When the names have been entered in the rate-book, it is the duty of the vestry clerk to make out therefrom the lists of voters, both parliamentary and local government. THE KING *v.* DAVIES **Div. Ct. 669**

**VOTERS**—Registration of.
*See* under PARLIAMENT.

**WALL**—London building—Party wall—External wall—Wall a party wall for portion of its height - - - - - **1143**
*See* LONDON. 1.

—— Party walls—London Building Act - **265**
*See* LONDON. 2.

**WAREHOUSEMAN** — Negligence — Notice of claim to bailor—Order by magistrate that goods be delivered to third party—Effect of - - - - - **291**
*See* BAILMENT.

**WARRANTY**—Sale of food and drugs—Adulteration.
*See* under ADULTERATION.

**WASTE** — Long lease — Repairing covenant — Breach—Relief against forfeiture **234**
*See* LANDLORD AND TENANT.

**WATER**—*Water Supply—London—Factory—"Domestic Purposes"—"Trade Purposes"—Water supplied for Lavatories and Water Closets used by Employees—Payment on Rateable Value — Metropolitan Water Board (Charges) Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 9, 16, 20, 25.

The defendants were the occupiers of a factory within the metropolitan area, in which they manufactured railway tickets and paper. Water was supplied to the factory by the plaintiffs, the Metropolitan Water Board, and there used for drinking and washing purposes by the defendants' workpeople, and for cleansing urinals and water closets used by them. No one resided upon the premises :—

*Held* (by Farwell L.J. and Kennedy L.J., Vaughan Williams L.J. dissenting), that the plaintiffs were entitled to charge for the water so supplied as for water supplied for "domestic purposes" upon the rateable value of the factory METROPOLITAN WATER BOARD *v.* COLLEY'S PATENTS, LIMITED - - - - - **C. A. 38**

2. —— *Waterworks—Water Rate — Where Owner and not Occupier liable to Payment—Empty House—Right of Water Company to cut off Supply—Water Companies (Regulation of Powers) Act*, 1887 (50 *&* 51 *Vict. c.* 21), *s.* 4.

By s. 4 of the Water Companies (Regulation of Powers) Act, 1887, "Where the owner and not the occupier is liable by law . . . . to the payment of the water rate in respect of any dwelling-house . . . . no water company shall cut off the water supply for non-payment of the water rate" :—

*Held*, that the words "is liable" refer to a liability at the date when the water rate became due, and that, provided that there was at that date an occupier other than the owner, and that the owner and not the occupier was liable for the payment of that rate, the section prohibits the water company from cutting off the supply for non-payment of the rate even after the occupier has given up possession and the premises have become vacant. METROPOLITAN WATER BOARD *v.* BIBBEY - - - - **Div. Ct. 74**

—— Waterworks—Communication pipe—Stop-cock box—Liability of householder to repair—Power to break up street for that purpose - - - - - **965**
*See* LONDON. 4.

**WILL**—Deed—Delivery to take effect on death of assignor—Testamentary document
*See* DEED. **367**

**WORDS**—"Documents" - - - - - **465**
*See* PRACTICE. 5.

—— "Domestic purposes" - - - - **38**
*See* WATER.

—— "Head officer" - - - - - - **516**
*See* PRACTICE. 4.

—— "Person" - - - - - - - - **832**
*See* ADULTERATION.

—— "Trade purposes" - - - - - **38**
*See* WATER.

—— "Yearly interest" - - - - - **550**
*See* BANKRUPTCY. 2.

**WORKMAN**—Employer and.
*See* under EMPLOYER AND WORKMAN.

**WRIT**—Service.
*See* under PRACTICE.

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